

The Handbook for Guardians and Conservators

a practical guide to New Mexico
law

written by

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1997 Disclaimer: Information provided in this manual reflects laws and regulations in effect in New Mexico as of 1997. This manual is intended as a practical guide for use by the general public. The purpose of the manual is to provide general information concerning guardianship, conservatorship and alternatives to guardianship and conservatorship. The authors of this manual are not engaged in providing legal advice or other professional services. This manual should not be used as a substitute for professional service in a specific situation. Users of the manual are urged to seek professional services regarding any specific situation. The manual was developed with funds made available from the State of New Mexico, Office of New Mexico Attorney General, Guardianship Services Project. The opinions expressed should not be construed as representing the opinion or legal advice of the Attorney General or any state agency or public entity.

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For ordering information, or to copy this publication on line, go to
www.guardianshipnm.org.

This handbook does not cover the process for guardianship or conservatorship for persons in Indian Country. Refer to the respective Tribal courts, laws and knowledgeable attorneys as needed in this area.

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Preface

You may have had a difficult time accepting that your family member or friend is so incapacitated that (s)he can no longer make health care and/or business decisions. You have discovered that because this person did no planning, a court-appointed guardian and/or conservator is necessary. Or you may have a developmentally disabled child who is now an adult and needs a guardian. You may then have had family disputes about who is best qualified to serve or who has the person's best interests at heart. Who has the time, patience and knowledge to make personal care decisions, living arrangements and financial investments for the incapacitated person? Finally, however, the court has appointed you as guardian (with the power to make all health and personal care decisions) and conservator (with the power to make all business and financial decisions).

So you're appointed. Now what? How do you make health care decisions for someone else? What if they did not put their wishes in writing before they became incapacitated? What if they have never had capacity? Can they get married to someone they meet in the nursing home? A bank certificate of deposit is coming due next month. Can you cash it in and buy some stock instead? Tax annual report and accounting. Even guardians must file an annual report.

This Handbook should help you in your new job as guardian and/or conservator for another. The Handbook is meant for those who serve as guardian and/or conservator for **adults**, not minor children. Many incapacitated people are older, but may also be young adults with temporary or permanent physical or mental disabilities. The book describes your duties, responsibilities and contains other resources if you need more help. Although the Handbook is a useful resource, it cannot completely answer all of your questions or cover every problem that may arise. At times you may need the help of a lawyer, accountant, tax preparer, social worker or case manager.

Please keep in mind that the duties as guardian and conservator can be difficult and energy consuming. You may benefit from support available, not only through family, friends or spiritual counselors, but also from various resources and organizations, which can provide information, education, and support groups. The Alzheimer's Association, for example, has support group lists, some funds for respite services to provide caregiver breaks, and various helpful books, pamphlets and other service contact information. See the list in the first Appendix of this book for more resource information.

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Chapter One

PROTECTED PERSON'S RIGHTS

When a person has a guardian and/or conservator named for him or her, (s)he loses many rights that we take for granted. This is why guardianship and/or conservatorship is a drastic measure and should only be used when there is no other way to take care of a person's problems.

Even though you have been named as a guardian or conservator, the **ward** or **protected person** (as (s)he is known in New Mexico) does not lose all rights. Your ward still retains all legal and civil rights as well as basic human rights. The ward or protected person still has the right to:

- _ make or change a will or trust;
- _ marry;
- _ vote;
- _ practice religion;
- _ receive personal mail;
- _ be represented by a lawyer;
- _ control personal spending money if granted an allowance;
- _ ask the court to end the guardianship and/or conservatorship or change the guardian and/or conservator.

The extent to which the ward can exercise these rights depends on his or her mental capacity. For example, although the ward has the right to make a will, if (s)he does not know what property (s)he owns or who his or her heirs are, the will would not be valid. The ward has the right to marry, but if (s)he does not understand what marriage means, then the marriage would not be valid. What is important to remember is that you cannot deny your ward certain rights just because (s)he is under a guardianship order.

If the ward is in a residential care home, or a nursing home or other long term care facility, the Patient's Bill of Rights and other state laws give him or her more rights. These include the rights to privacy, to have visitors, to have telephone calls and to be free from nontherapeutic chemical and physical restraints. Again, depending on the ward's situation, you have the right to place restrictions on these rights, e.g. to forbid undesirable visitors or limit telephone calls.

If the guardianship is limited, the ward has all the rights not specifically limited in the court order. For example, (s)he could continue to run a small business, could hire his or her own caretakers, could continue to participate in his or her own healthcare, could choose a place to live, or take a trip if none of these activities was forbidden by the court order.

In general the ward is entitled to respect and understanding, and the right to have his or her voice heard, even if sometimes that voice is expressing thoughts that may not make sense to you. The ward has the right to express concerns, ask questions and make suggestions about decisions you are making for him or her. The ward has basic human rights of privacy and the right to be well cared for. The ward also has the right to be free from physical or sexual abuse, financial exploitation, neglect and self-neglect.

After you understand what rights the ward retains, you must focus on your powers and duties as guardian.

Chapter Two

POWERS AND DUTIES OF GUARDIAN

- **Get Letters of Guardianship**
- **Give Notice of Appointment**
- **Living Arrangements (at home or in a facility)**
- **Meals**
- **Clothing**
- **Recreation**
- **Spiritual Life**
- **Education**
- **Health Care Decisions**
- **Limits on Guardian's Powers**
- **Penalties for Wrongdoing by Guardian**
- **Fees for Guardians**
- **Annual Report to Court Required**

Introduction

A **guardian** is a person appointed by a court to make *personal and health care decisions* for someone who is impaired because of mental illness or dementia, physical disability or substance abuse. Someone who is impaired in this way is considered **incapacitated**. Before a court will appoint a guardian, the incapacitated person must have shown that (s)he is not able to manage his or her personal care decisions.¹ Personal care decisions cover such things as medical care, nutrition, clothing, shelter, hygiene or safety.

New Mexico law states that a guardianship should encourage the individual's independence and should be limited to the powers necessary to help with the person's mental and physical limitations. In New Mexico a guardian is appointed by a court to provide for the care, custody or control of the incapacitated person (called a **ward**). This chapter will outline your powers and duties after you are appointed as guardian.

Temporary Guardian

If you were named as a temporary guardian to take care of immediate and pressing needs, the order appointing you guardian will last only 60 days unless the attorneys and judge agree to extend it. During this time, you will only be able to do specific things outlined in the order, such as clean up your ward's house or agree to a medical procedure needed immediately. You should not move the ward from his or her residence unless the court specifically orders it.

Permanent Guardian

Once you have been named as the permanent guardian you will have the power to make certain decisions for your ward, depending on whether you are a limited or full guardian. As mentioned above, if the guardianship is **limited**, you will have the power only to make specific decisions for your ward. Your ward will be able to make all other decisions because (s)he retains that right.

If you are the **full** guardian of the ward, you have the same powers, rights

¹The New Mexico Uniform Health-Care Decisions Act (UHCDA) may reduce the need for guardianships, but not conservatorships. UHCDA is discussed in a companion manual called **Alternatives to Guardianship and Conservatorship**, which is available from the New Mexico Guardianship Association at guardianshipnm.org.

and duties that a parent of a minor child has except you do not have to pay your ward's bills out of your own money. **Unlike** a parent, you are not liable (legally responsible) for your ward's acts just because you are the guardian. You must be negligent or careless in some way to be liable for damages or injuries to others. You can find out more about your liability below.

You are entitled to the **custody** of the ward. That does **not** mean that your ward must live with you, but you must decide where (s)he will live, depending on his or her wishes. You must decide what is appropriate for your ward: (1) staying in his or her home or apartment; (2) living in a residential care home, or an assisted living facility; or (3) moving into a nursing home. You are responsible generally for making sure that the ward stays healthy and his or her food and clothing needs are met. You are also responsible for recreation and for seeing that your ward receives appropriate training and education, and involvement in their chosen spiritual practice. Another very important responsibility of a full guardian is being able to consent to or refuse medical treatment of any kind for the ward. **The order appointing you as guardian should state that you have complete authority over the incapacitated person's health care matters.** If the ward is taking psychotropic medications, the Court may add an additional provision that allows the guardian to authorize the administration of such medications, or other psychiatric treatment, as discussed later in Chapter Two under *Making Health Care Decisions*. The order should also state that the guardian's powers override any powers given to an agent previously appointed under a power of attorney.

What You Should Do After Becoming Guardian?

❶ Obtain Your Letters of Guardianship

After the judge appoints you as guardian, you must sign a statement accepting your duties as guardian and promising that you will carry them out faithfully. The clerk of the court will then give you what are called **Letters of Guardianship** or, simply, **Letters**. (Sometimes the petitioning attorney gets these Letters for the guardian). These Letters are your proof that you are the guardian. You should get certified copies of these Letters from the court to prove that you are authorized to act; doctors, nursing homes or insurance companies often request certified copies.

When the court clerk gives you your Letters, (s)he will certify one copy without charge. The clerk certifies the Letters by affixing a court seal to a copy of the Letters and signing a notation, which is dated on the day the certification is made, that the Letters are in full force and effect. You can get additional certified copies of the Letters for a small fee. Some providers, after reviewing your

certified copy, will simply make a photocopy for their own files.

② Give Notice of Your Appointment as Guardian

Once you are appointed guardian you should notify any family members of the ward who do not already know that you are now the guardian. You should notify your ward's doctor, dentist, health insurers, teachers, caretakers, nursing home administrator, and any other interested person that you are responsible for your ward and authorized to make decisions and act on his or her behalf. Send a photocopy of the Letters to each of these people. A sample letter giving notice is included in the Appendix.

Occasions may arise when a doctor, nursing home administrator, or family member will not recognize that you as guardian have the authority to make personal decisions for your ward. It is important that you stand up to these people, reminding them that the court has appointed you guardian and that by law you are the only person able to make these decisions.

Many times the conflict will not continue after you have made your position clear, but if the doctor or family member still opposes you, go back to your attorney for help or contact the judge (or his or her replacement) who presided over the guardianship. A letter or telephone call from your lawyer or a judge's order may convince those who are refusing to accept your authority. When the situation is serious, such as conflict over the withdrawal or continuation of life support treatment or care being received in a nursing home, it is important to seek help quickly.

If family members continue to fight with you over your decisions, mediation² is a good way to settle these conflicts. Sometimes, having one family member whom everyone respects deal with the family can help calm an unpleasant situation. Unfortunately, in some families your decisions may always be opposed by others, no matter how hard you try to explain your reasons.

Often the conflict is with your ward who has enough capacity to know that (s)he does not want a guardian since (s)he believes (s)he has taken care of himself or herself all these years and does not need your help now. Sometimes you can make the situation better by just giving the ward responsibility in areas (s)he can handle—choosing the homemaker to help with daily chores, buying groceries, deciding on certain medical treatment, helping to choose a shelter care home, deciding on religious and recreational activities. Often you can gain your ward's

²A companion manual called **Alternatives to Guardianship and Conservatorship** discusses mediation and other ways to resolve conflict. It is available from the New Mexico Guardianship Association at guardianshipnm.org.

trust by remaining calm and explaining to the ward what you are doing. By always including the ward in what is going on, you can perhaps make the ward feel better about having a guardian.

Sometimes the best resolution is to let your ward care for himself or herself until the situation becomes too dangerous for him or her to remain alone. You can also get advice from other guardians, a case manager, social worker or agency that deals with people like your ward. In the end, you may have to give up being guardian if you feel your ward would better accept the authority of someone else. If your ward's behavior makes it unsafe for him or her to continue in his or her living situation, you may have to place the ward in a facility that can handle his or her behavior.

③ Plan for your ward's needs

Each person is different and your ward is an individual also. Plan for your ward's specific needs and take care of the most urgent needs first. Then arrange for general needs, including:

- living situation;
- health care, discussed in more detail below;
- meals;
- clothing and personal property, such as jewelry, cars and furniture;
- personal care, such as bathing, haircuts, manicures, etc.;
- housekeeping, including cleaning, and arranging for yardwork;
- care of the ward's pets, if necessary, including feeding, grooming, exercising and getting yearly shots;
- transportation to appointments, social events, shopping, church, etc.;
- recreation and hobbies; and
- education.

If you do not know the person well or if the ward is very difficult, you can hire a professional person to help you, such as a case manager or social worker who works with disabled adults or the elderly. You should involve your ward as much as possible in making these arrangements.

Here is a checklist to help you assess your ward's needs. Decide which tasks your ward can do without help and which tasks the ward needs help with:

- getting around (does the ward need a cane, walker or wheelchair?);
- using the bathroom (does the ward need help getting in and out of the shower or bathtub or on or off the toilet? Does the ward know

- when (s)he needs to use the bathroom?);
- dressing, hair care and other grooming;
- taking medications on time and in proper amounts;
- meals (can the ward shop, cook, clean up, properly store food and remember to eat regularly?);
- clothes (can the ward shop for clothes?);
- cleaning the house, doing laundry and other chores;
- using the telephone;
- handling an emergency at home; using the phone to call 911; being able to exit the home independently if needed;
- using the bus, taxi or other transportation services;
- paying bills and managing his or her money.

Other factors to consider are: (1) how good is the ward's memory; (2) how good is the ward's ability to make decisions; (3) is the ward violent, mean or uncooperative; (4) is the ward confused or disoriented, and, if so, how often; and (5) is the ward a danger to himself or herself or others. What kind of help you arrange for the ward will depend on how you evaluate your ward's needs and abilities.

If you were not named conservator of your ward's estate or do not already have his or her power of attorney for financial matters, you should meet with the conservator to find out about your ward's assets in order to make arrangements that (s)he can afford. If you spend money not approved by the conservator, you may have to repay that money out of your own pocket. (See page 27 for a discussion of this relationship.)

Choosing a place to live

Staying at home

One of your most important jobs is to decide where your ward will live, keeping in mind your ward's wishes and lifestyle and what (s)he can afford. The first place to consider is your ward's current residence. If your ward is living at home, (s)he should be able to stay at home if (s)he wants as long as help is available to ensure (s)he will be safe while remaining as independent as possible. The following are some suggestions for keeping the ward at home, considering what (s)he can afford:

- hire part-time or full-time help to prepare meals, do laundry and other housekeeping jobs (it is usually safer to obtain help through

- reputable licensed and bonded agencies, but if the ward cannot afford such help, be sure to screen in-home help carefully);
- adapt the house where necessary to your ward's physical needs with wheelchair ramps, grab bars etc.;
 - clean the house and yard;
 - buy a fire extinguisher, and smoke and heat detectors;
 - subscribe to an emergency response medical system (e.g., Lifeline);
 - get a safe return bracelet;
 - change the locks and/or consider installing a burglar alarm or other security system;
 - if someone else is living in the home to hear the alarm, install a wander guard system;
 - if your ward is renting, see what repairs the landlord can make and how (s)he can adapt the house or apartment for you;
 - get relatives, friends and neighbors or social service agencies to help with your ward. Make sure you are aware of all the community resources like Meals on Wheels, adult day care, home health/homemaker assistance and the disabled and elderly waiver program administered by the state. (See list of resources in Appendix).

These suggestions will also help if your ward moves into your home.

If the ward has the assets to pay for extra help, it is your job to arrange for as much help as possible to ensure the ward's safety and independence. **It is not your job as guardian to preserve the ward's assets for your inheritance or for the inheritance of other family members.** The ward's money should be spent on his or her care first and foremost. No one but the ward has a right to his or her assets during the ward's lifetime.

Moving into Residential Care Home or Other Facility

If the ward cannot safely live at home or does not have the resources or family support to do so, you must explore other living arrangements. A residential care home with several other residents, assisted living where (s)he has his or her own room but eats with the other residents or a nursing home are all possible choices.

There are several types of facilities grouped under the description of **licensed adult residential care facilities**. They range from small homes known as **residential care homes** to the larger, hotel-type **assisted living** facilities. Residential care homes provide a room, cleaning services and meals. Sometimes

they offer recreation or transportation. The bigger assisted living facilities may provide a small apartment with a kitchen, cleaning service, and meals shared with other residents in a dining room. They may also offer recreation and transportation. Some of the more expensive places may provide a nurse on the premises. Residents of residential care homes must be ambulatory (able to get around on their own) and not have too many medical problems.

In **nursing homes** residents have a room, often shared, meals, help with personal care and medication, and “around the clock” nursing care as needed, supervised by a doctor. There are also places designed especially for people with Alzheimer's type symptoms; these are usually quite expensive, if not covered by Institutional Medicaid or a Medicaid Waiver program.

Continuing care retirement communities or **life care communities** are much more expensive. But they offer different types of living arrangements and levels of care from independent apartments or cottages to skilled nursing centers.

Whatever you choose, be sure you have made your decision based on the ward's finances, lifestyle, personal needs and medical condition. Work with an agency in your community (if there is one) that can help you find the best place. There are pamphlets available through the state Aging and Long Term Services Department, AARP and your Area Agency on Aging that have checklists of things to look for in both residential home care and nursing home facilities. The Appendix has information about these resources.

If your ward will be moving into a residential care home, be sure the home is licensed and that you have checked out the owner and the director of the home. The New Mexico Department of Health, Licensing and Certification Bureau, will have this information on residential care homes.

Even though your ward is in a care facility, there is still the opportunity for him or her to be abused, neglected or financially exploited. Be aware of bruising that no one can explain and other injuries or whether your ward is badly dressed. If your ward is afraid of a nurse, a helper or other resident, it may be a sign of abuse. If your ward has access to his or her money, make sure you know how it is being spent. You can talk to the owner of the home or the administrator of the care facility about your concerns; speak to the doctor or complain to the **ombudsman**. An ombudsman is a person who, under the direction of the state Aging and Long Term Services Department, visits residents in nursing homes and residential care facilities to listen to their concerns and complaints. The ombudsman tries to solve the problems either by himself or herself or with outside help.

Call Adult Protective Services (APS), a division of the Aging and Long Term Services Department, if you think your ward has been abused, neglected or financially exploited. Currently, the number for reporting possible abuse, neglect,

self-neglect or exploitation is 1-866-654-3219. The toll free information number for state government is 800-825-6639 to request any additional phone numbers.

Besides doing the above to ensure your ward's safety, do not forget simpler, more practical steps to make life more comfortable for your ward:

- arrange for visitors to the home;
- arrange for visits by clergy or rabbi and members of your ward's church, synagogue or other spiritual community;
- decorate your ward's room with personal objects and pictures;
- install a "Granny Cam" in the room for monitoring care;
- have family and friends write letters and cards;
- provide food and beverages, a radio or TV, large print books and magazines, a private telephone, E-mail access;
- provide ear plugs to keep down noise from roommate or neighbor;
- arrange for parties to celebrate important occasions;
- check often on the ward's medical condition, that (s)he is not over-medicated and is getting the correct medicine;
- check that your ward is eating well; try eating with the ward from time to time or taking him or her to your home or a restaurant for a meal.

In some situations you might have to keep certain visitors away from your ward. It is your responsibility to make life as safe and emotionally comfortable as possible for your ward, and that might include limiting who visits.

Tips for Guardians Who Live Outside New Mexico

You can be named guardian even if you do not live in the same town, county or even state as your ward. If you live out of the area, you may have to consider whether your ward should move to your community. You must balance your ward's wish to stay where (s)he lives against the importance of being physically close to your ward and how you will be able to oversee your ward's living situation and provide the necessary support. If your ward remains in his or her community, here are several useful suggestions for helping him or her from a long distance:

- Have someone visit your ward frequently and report back to you; you may want to offer to pay a friend or neighbor reasonable out of pocket expenses;
- Regularly contact the place where your ward lives and speak

to him or her and the caretakers; make sure your ward is able to speak to you privately so that (s)he can inform you of any problems with his or her living situation; have a telephone placed in your ward's room;

- Write or E-mail frequently and arrange to have our letters and cards read aloud if your ward cannot see or read well; remember to include photographs;
- Visit your ward from time to time; you may be able to get your travel expenses reimbursed from your ward's assets;
- Consult a case or care manager, social work department in your ward's community or the court visitor if you need information, referrals or assistance.

If you plan to move your ward to your community, you must inform the visitor and guardian ad litem of this plan before you are appointed guardian as the court will need to consider whether this is in the best interest of the ward. It may be easier to begin the guardianship process in your own district. However, if your ward will not move willingly you will have to complete the guardianship in your ward's district. If you decide to move your ward later, you do not need permission of the court unless the order appointing you guardian specifically requires this. Be aware that there may be differing laws in different state regarding guardianship, and affecting the transfer of the guardianship appointment from one state to another.

Arranging for Meals

If your ward is living in his or her home, be sure that your ward is eating all of his or her meals. You may want to try some of these suggestions for helping your ward eat well at home:

- ask your ward what food (s)he likes;
- learn about his or her eating problems, such as poor dentures or digestion problems;
- remove old, moldy or expired food from the refrigerator and cabinets;
- take the ward to a senior meal site every day (or arrange for transportation there);
- have Meals on Wheels or home-delivered meals come by daily to provide a meal; provide between meal shakes (Ensure, Boost, etc.) if the primary physician agrees.

- invite the ward to your home for dinner or out for a restaurant meal.

Whether your ward lives with you at home or in a residential care setting or nursing facility, you should note whether your ward is showing signs of problems that could lead to poor nutrition. Make sure that other caregivers are aware of these changes and problems:

- depression;
- stress or agitation;
- death of someone close;
- fear that (s)he is running out of money;
- lack of money;
- memory problems;
- false teeth that do not fit;
- drinking or taking drugs or medicines that interfere with appetite.

Caring for clothes and other personal property, including the car

Another thing you are responsible for is making sure your ward has adequate clothing. You are often dealing with a person who is not aware that his or her clothing is dirty or worn, who does not want to change and who refuses to buy new clothes. You do not have to use your money to buy clothes, but you may use his or her money to buy new or secondhand clothes. Your ward may enjoy shopping with you, or you can arrange for someone else (a trusted friend or relative) to take your ward to the stores. Keep in mind your ward's living situation and buy suitable clothes. Remember these things about clothing:

- make a list of the ward's clothes and correct sizes;
- do not throw away clothes without checking with the ward first;
- take your ward shopping and/or go through a catalogue with him or her;
- help your ward choose clothes for special occasions;
- make sure clothes are washed and/or dry-cleaned;
- if your ward is in a care facility, make sure clothes are permanently labeled with his/her name and (s)he gets new clothes as needed.

If your ward has a car or other vehicle and (s)he is still able to drive, you must see that the vehicle is insured and fees paid. You must make appropriate

arrangements for the vehicle, if the ward is no longer able to drive. (For a discussion of driving, see the publications on the Alzheimer's Association website, www.alz.org under "driving", or order from them the publication, *At The Crossroads, A Guide to Alzheimer's Disease, Dementia and Driving*, published by The Hartford.) The ward may insist on driving when (s)he is unable to do so safely. You may have to meet with the conservator to discuss this problem. See page 39 for more information on driving. Talking about the car and other financial issues with the conservator, if there is one, should help you make good decisions for the ward.

Similarly, you must see that your ward's furniture is cared for, storing, selling or giving it away when the ward is no longer able to use it. If there is other property that needs protection and you as guardian are not authorized to protect it, you must petition to have yourself or another person named as conservator.

Arranging Recreation and Education

You should provide your ward with a radio or stereo if (s)he likes music. If (s)he has a pet, try to keep the pet with him or her. At least have the pet visit the ward or the ward visit the pet. Before your ward moves to a nursing facility, check whether it has a "visiting pet" program. Be sure the ward's hearing aids are working properly and that (s)he can hear. Have family and friends visit frequently and take your ward on outings. Arrange for your ward to take trips if (s)he can. Check out day care and other programs in your senior centers and sign up your ward for some of them. If your ward needs training, either to be able to do tasks of daily living or to get a job, or if (s)he is able to be educated, you should make sure (s)he can take advantage of whatever programs or resources there are. Side by side programs in public schools, state vocational rehabilitation programs and community colleges are available for incapacitated adults. Work programs are available for persons with developmental disabilities.

Using community resources

Your community probably has one or more of the following support services available. Become familiar with what is offered and take advantage of what would benefit your ward and you. Some services are free or have a reduced fee; others you must pay for. Services you may need to help you care for the ward include:

- Case management services (a social worker or other care manager will recommend coordinate and monitor necessary services for your

ward. Case or care managers work for city or state agencies, private companies or themselves);

- Meal services, such as Meals on Wheels (a private, nonprofit group) or home-delivered meals through the Department of Senior Affairs or other agency (in Albuquerque check the blue pages of the telephone directory under City, Department of Senior Affairs for information; in other communities check under Area Agency on Aging);
- Homemaker, home health and personal care services for chores, bathing, shopping, cooking, etc.;
- Senior centers for activities, meals, trips and classes;
- Adult day care;
- Day programs for people with developmental disabilities;
- Transportation services (Department of Senior Affairs or a private service);
- Personal contact programs, such as telephone visitors;
- Emergency response services that offer things like “emergency call” buttons;
- If you are also the conservator, bill payment services including assistance with medical bills and insurance statements.

The Resources section of this Handbook contains some information about available community resources.

Making health care decisions

Examples of health care decisions that may need to be made include:

- buying or maintaining health insurance;
- consenting to medical treatment, such as medicine, surgery, flu or pneumonia shots or treatment options;
- choosing doctors, hospital, hospice services, rehabilitation centers or other health related facilities;
- giving instructions about whether or not to resuscitate someone;
- giving directions about withholding or withdrawing life support;
- deciding whether or not to provide, withhold or withdraw artificial nutrition and hydration;
- working with doctors, nurses, social workers and pharmacists;
- arranging dental care;
- obtaining hearing aids or other amplification devices, glasses,

walkers, canes, Merrywalkers, wheelchairs, chair alarms, oxygen and other devices to help the ward;

- obtaining care for the feet (podiatric care);
- ensuring proper diet.

Although there are many duties that you can delegate to another to perform for your ward—provide shelter and other daily care, transportation, education—ordinarily you **cannot** delegate the duty to make health care decisions, especially end-of-life decisions. However, if you are temporarily ill or out of the country and unable to communicate, you could draw up a specific and temporary power of attorney for someone to make these important decisions on your behalf. If you no longer want to serve as guardian for another, you must resign and have a substitute guardian appointed.

When you are a guardian for another, your job is to stand in the incapacitated person's shoes and make health care decisions on behalf of that person. You should make health care decisions according to the person's instructions and other wishes, if known. There may be advance healthcare directives or a medical power of attorney with end of life instructions contained within the document. Check for other written documents, such as a Living Will or Five Wishes, or a values history. Ask family members if they ever discussed the person's wishes when (s)he was mentally alert and try to apply that person's values and beliefs. **Keeping your own desires or wishes out of the decision-making process is very important.**

The United States Supreme Court has ruled that people have the right to refuse or accept medical treatment. You have the right to refuse a particular treatment even if doing so will hasten or cause your death. Doctors are supposed to honor your wishes or your instructions as guardian of another person. If you know that your ward would **not** want a certain treatment or surgery, you should tell the doctor not to treat the ward. Likewise, if you believe the ward **would** want a particular treatment, it is your job to instruct the doctor.

If you do not know the incapacitated person's wishes, you should make health care decisions in that person's best interest, taking into account his or her personal values. While there is no set test for deciding the best interests of a person, consider whether a person has:

- A reversible condition that could be changed for the better if treated;
- The ability to be rehabilitated;
- The ability to communicate with others through speech, eye contact or writing;
- Any quality of life, no matter how minimal;

- Pain;
- A disease, the treatment of which would make the person suffer more.

When trying to decide another person's best interests, you must consider medical, ethical, economic and religious issues, as well as legal issues.

Some people have never been able to state their wishes; these cases are the most difficult. Those who have never had capacity may have developmental disabilities, such as mental retardation, severe cerebral palsy or autism. For those who have never had capacity, decision-makers must be especially careful when determining best interests. Withholding treatment **solely** because someone is old or disabled is improper. Even if the person does not have the same quality of life that you might enjoy, you must consider what quality of life is "normal" for the incapacitated person. If possible, you should then make decisions that help that person continue the activities that (s)he has done in the past.

The incapacitated person may be able to guide you from time to time. Some people have limited capacity but may think clearly when medications have worn off or at certain times of the day. If you are an agent or surrogate for someone who is able to communicate, be sure to talk to him or her before you make an important decision. Be sure you are following that person's instructions the best that you can, no matter what your own personal beliefs are.

It is your job to talk to doctors and pharmacists and ask questions so that you understand what you are deciding for the ward. You should not agree to treatment or medication for the ward unless you feel you have all the information you need to make an informed decision. Doctors need to know about **all** medications being given to the ward, including over-the counter medications, as well as vitamins and any other supplements or herbs. Sometimes medications can work against each other. If you can establish good communication with doctors and pharmacists, your job should be easier. Nurses and physician's assistants are also able to answer some questions.

Other things to discuss with the doctor include:

- how often the ward needs to see the doctor;
- if the ward needs a special diet;
- what the long range effects of treatment options are;
- whether the doctor has talked with all of the ward's other doctors;
- what side effects medicines, herbs or other supplements may have and what reactions are serious enough to call the doctor immediately;
- whether the ward has any allergies or other medical conditions of which you should be aware;

- whether your ward would benefit from physical therapy or using special medical equipment;
- how long medicines should be taken and why they are being prescribed, and if they are discontinued do they require gradual dose reduction.

You may feel certain that the doctor has given you all possible treatment options, but you are still not sure what to do. Feel free to get a second opinion from another doctor. Most insurance companies will pay for a second opinion.

As guardian you have the right to review the ward's medical records and to be fully informed about the medical care. You are also free to change doctors. If you do change doctors, make sure the new doctor receives all of the ward's old medical records.

If you and other family members disagree over the ward's health care, remember that sometimes you may have to fight for the rights of the person for whom you are responsible. Being an advocate for a patient can be difficult, especially when other family members object to the decisions you are making. Talking about difficult topics among family members, medical providers and decision-makers should help guide everyone toward focusing on the patient's wishes and values.

Health care providers may be caught in the middle if the guardian directs one treatment and other family members want a different treatment. **Communication with family members and friends is essential.** If you and your doctor disagree on health care decisions (for instance, your doctor may believe in trying all treatments no matter what the patient's wishes are), you should consider finding a doctor whose views are more compatible with those of your ward.

Meeting with a hospital ethics committee or accessing the University of New Mexico Health Sciences Center Institute for Ethics may be helpful in coming to resolution of health care treatment dilemmas.

Sometimes you should not communicate with family or friends. When you are named guardian, you learn a lot of information about your ward, including information about his or her behavior, and financial and medical information. You must be careful about sharing this information, especially medical information. Doctors and other health personnel do not tell anyone about a person's medical condition without authorization from the person. Respecting rules of confidentiality, your ward's right to privacy and his or her sense of dignity means that you should not discuss what you know about your ward with others, unless necessary. For example, you would discuss a medical condition with someone who is helping take care of the ward. In a family where everyone shares information and nothing is a secret, you must decide how much you can tell the

others about your ward—enough to make them not feel left out, but not the details that most adults would want kept private.

Regarding **mental health decisions**, if your ward needs treatment such as visits to a psychiatrist or psychologist, you as guardian can arrange for the visits. If you have the authority to make health care decisions for the ward, you can also agree to your ward receiving certain drugs for mental health problems while (s)he is in a residential care or nursing facility.

If it is recommended that your ward enter a residential treatment facility for mental health treatment and (s)he is unable to consent or refuses to go, you can request for him or her to be picked up by the police. You may need to have a mental health professional submit a Certificate of Evaluation for the ward to be picked up if it is not an emergency. (For assistance call 242-COPS, or 242-2677). The Albuquerque Police Department Crisis Intervention Team (CIT) or a Crisis Outreach Officer are good sources of information and support in these difficult situations. Your local mental health facility could also guide you on what steps to take. If you are uncertain in an emergency situation call 911. If your ward is committed against his or her wishes because of a dangerous situation, there will be a court hearing on whether (s)he needs to remain in the facility. If at the hearing it is recommended that your ward be committed to the facility for a period of time, a **treatment guardian** may be appointed to make mental health decisions for the ward while (s)he is in the facility and up to a year afterwards. Other mental health treatment such as electroconvulsive therapy, psychosurgery and experimental treatment may also require that a treatment guardian be named. Most likely the guardian will also be named as treatment guardian but someone else could be appointed since the laws governing mental health (Mental Health Code) are separate from the laws of guardianship (Probate Code).

A treatment guardian works closely with the physicians and other mental health personnel in making decisions about the ward's treatment. A treatment guardian must make sure that he is kept informed about what is happening. Be sure your duties as treatment guardian are carefully explained to you before the hearing at which you are appointed.

Although the Mental Health Code is separate from the guardianship provisions of the Probate Code, there are overlaps with respect to treatment. Frequently the administration of psychotropic medications does not require the appointment of a treatment guardian if a guardian is already appointed and consents to such treatment. The Probate Code powers of a guardian are interpreted by many attorneys and healthcare providers to allow a guardian to consent to the administration of psychotropic medications because the guardian has the power to make all medical decisions, which by definition include mental health decisions. The Mental Health Code does not specify that a guardian may

not make mental health decisions. Therefore, unless the law changes, many people feel that guardians under the Probate Code can make mental health decisions. Ideally, this language should be included in the court order appointing the guardian under the Probate Code.

Regarding mental health decisions, the guardian or treatment guardian should review any current requirements enacted based on issues involving what is commonly referred to as “Kendra’s Law”, including emergency treatment of non-hospitalized mental health patients against their will.

Guardians should obtain court review and judgment regarding any proposed extremely invasive procedures, such as sterilization to prevent children from being born; a judge should decide whether this is appropriate. However, full discussion of sterilization, birth control and abortion is outside the scope of this manual.

In some cases, the ward may have created a Mental Health Power of Attorney. If this is the case, it should be useful information for the guardian regarding making decisions with and for the ward, even if the guardianship now overrides this power of attorney.

When you have questions about what you can or cannot do for your ward if s/he shows signs of mental health deterioration or is developmentally disabled, a good resource is Protection and Advocacy, Inc., (505) 256-3100 (Albuquerque) or 1-800-432-4682 (statewide).

Limitations on Guardian

It cannot be stressed often enough that you must respect as much as possible the independence of your ward. You should be limited in what you do for your ward by what your ward can do for himself or herself. However, if you were appointed as a full guardian, you have the final authority to act for your ward. As discussed above, you must act in your ward's best interest, deciding what your ward can do and what you should do. The court may also have limited you formally in its order as to what you can do for your ward. For example, perhaps you can only make medical decisions for your ward because (s)he does not understand his or her medical situation, but your ward can make other decisions affecting his or her daily life, such as what clothes to wear and what activities to do.

Liability of Guardian and Penalties for Failure to Perform Duties

New Mexico law states that a guardian is not legally obligated to use his or her own money to pay for his or her ward's needs or debts. As guardian, you use whatever funds or income the ward has for his or her care. If your ward's income is very low, for example, (s)he only receives SSI payments (Supplemental Security Income) and/or has no savings accounts or other assets and no family members or others who can help financially, you may have to place your ward in a facility that provides good care and accepts the low payment. You will have to obtain clothing from a clothing bank or second-hand store and generally do what you can with the available funds. In other words, you must see that the ward's needs for shelter, food and clothing are met, but you do not have to use your own income or savings to do so.

Nor is the guardian liable for the wrongdoing of the ward just because (s)he is the guardian. In order for the guardian to be personally liable (financially responsible), the guardian must be **negligent** in some way in caring for the ward that allows the ward to harm someone else or their property. For example, your ward lives with you and you know (s)he is somewhat destructive. However, you leave him or her home alone and (s)he goes next door and breaks into your neighbor's house or car. In this situation, you may be liable for any damages.

If you place the ward in the care of someone else whom you know is not keeping a careful watch over him or her and your ward harms someone or something, you might be found liable. You may also be liable if your ward hurts himself or herself bicycle riding because you did not give him or her a helmet. In other words, you may be liable for damages if you do not take reasonable steps to prevent your ward from hurting himself or herself and others or their property. You may want to talk to your lawyer in more detail about liability and consider buying insurance that will prevent you or your ward from having to use your money for damages your ward might cause.

Being a guardian for someone means you wear many hats. In some ways you are like a parent having to make important decisions about your ward's care and sometimes actually being your ward's caretaker. Like a parent you are often a teacher. You are an advocate for your ward to make sure (s)he receives what (s)he is entitled to and is treated with dignity. If you are not also the conservator of your ward, however, you are **not** the financial planner, money-manager, bill payer or investor.

Please note, it is not appropriate for a professional guardian (someone who

does this work for a living and usually works with more than one person under guardianship) to have the ward live with them. Also, it is not appropriate for an owner or staff of a residential facility where the ward lives to be guardian of the ward, unless related by blood or marriage.

Fees for Serving as Guardian

A guardian is entitled to **reasonable fees** for his or her services. A guardian can also receive reasonable fees for room and board provided to the ward. Many family members do not ask for fees for their services as guardians, but others who give up jobs and limit their activities to become guardians do receive compensation when their wards' income and assets allow.

Your lawyer or the petitioner's lawyer may ask that you receive fees for your work as guardian at the guardianship hearing. Keep an accurate accounting of time spent on matters relating to your ward, money spent on travel, or buying things for your ward, and the amount your ward should pay for room and board in your home. **Remember to keep receipts for all of your ward's expenses.**

If you are also the conservator, you pay yourself; otherwise, the conservator, if any, will pay you. Reasonable fees are based on the ward's assets and the amount of work it takes to care for the ward. For example, if your ward receives only Social Security as income and must spend most of that on shelter care, your fees will be low. These fees are counted as **income** for tax purposes. Besides paying state and federal taxes on them, you have to pay New Mexico's gross receipts tax because you are providing a service. Talk to your accountant or the New Mexico Taxation and Revenue Department about these taxes and how you should report them.

Reporting Requirements

Every year you will have to file a **report** on your ward's personal situation (see the Appendix for a sample). You should keep blank copies of the report form and on the anniversary of your appointment, complete and file the report with the court that appointed you. If the ward moves out of state, you must follow the procedures that the new state laws require. You can remain in New Mexico and continue to act as guardian for your ward (see page 11 for more discussion).

The report is due each year within thirty days of the anniversary date of your appointment as guardian. If you cannot complete the report on time, you can ask the court for an extension of up to sixty days. If you do not file this report, you may have to pay **\$5.00** out of your own funds for **each day** that your

report is late. **You must also give copies of the report to the judge who appointed you, to the incapacitated person (even if they cannot read or understand), and to the conservator, if any.** The judge who appointed you as guardian should review the reports. The judge can follow up with inquiries or further court proceedings if (s)he reads something in the report that does not sound right or that (s)he does not understand. These reports are kept confidential.

Ending a Guardianship

You will serve as guardian until you decide you are no longer able or available to handle the responsibility of being a guardian or you become incapacitated yourself. If the court rules that the ward has regained capacity or if your ward dies, you will also be released as guardian. Your lawyer or your ward's lawyer will petition the court to end the guardianship or change the guardian (if the guardianship is being transferred to a state contracted entity under the New Mexico Developmental Disabilities Planning Council Office of Guardianship, special requirements apply). Unless your ward has died, or the court allows a change without a hearing, there will be a court hearing on the matter, following the procedures set out in New Mexico law.³ The judge will sign an order formally releasing you from your position as guardian and making any other appropriate order.

If the guardianship ends because of the ward's death, the guardian must notify the court and provide a copy of the death certificate to the judge. The presiding judge may want you to file a petition to dismiss the guardianship and submit a corresponding order. If so, you can ask your attorney to do this, or use Forms 8 and 9 at the back of this book. A final guardianship report must be filed at the same time (see Form 7) that reports the applicable information.

If your ward moves out of state, you will have to apply to the court in the new location to be guardian. Your lawyer will file a petition asking that your New Mexico guardianship be recognized in the new state, following the procedures set out in the new state's law.

Serving as a guardian for another person requires a large amount of time, patience, sensitivity and care. Before you agree to serve, make sure you have the time and dedication to do a good job.

³The court procedure for guardianship and conservatorship is discussed in a companion manual called **Alternatives to Guardianship and Conservatorship**, which is available from the New Mexico Guardianship Association at guardianshipnm.org.

Chapter Three POWERS AND DUTIES OF CONSERVATOR

- **Manage Assets**
- **Make Investments**
- **Pay Bills**
- **Safe Deposit Box**
- **Government Benefits**
- **File and Pay Income Taxes**
- **Automobiles**
- **Insurance**
- **IRA's and Pensions**
- **Conservatee's Debts**
- **Preserve Conservatee's Estate Plan**
- **Commingling of Assets Prohibited**
- **Inventory**
- **Annual Accounting to Court Required**
- **Annual Report to Court Required**

What is a Conservator?

In New Mexico, a **conservator** is someone appointed by a court to protect and manage the finances of someone (called a "**conservatee**") who is unable to do so himself or herself as a result of illness or other disability. Thus, just as guardians make personal decisions for people unable to make such decisions for themselves, conservators are responsible for protecting conservatees' property and using the property for the conservatees' benefit. The responsibilities of a conservator include:

- locating and managing the conservatee's finances;
- making sure the conservatee's bills are paid;
- investing his or her money wisely;
- making sure that the property is safe, and insured when necessary and appropriate;
- seeing that the conservatee is receiving all the income and benefits (s)he is entitled to; and
- verifying that tax returns are filed on time.

There are many reasons why a conservator might be needed. For example, the conservatee may not be able to keep track of his or her money or may not remember to pay his or her bills. (S)he may be giving away large amounts of money to strangers or spending large amounts of money on sweepstakes and lotteries. (S)he may need help managing investments.

A conservator can be a family member or friend, or it can be a bank or other company that is in the business of managing finances for other people. In either case, the conservator is expected to act wisely and for the good of the person who needs assistance.

Powers and Duties of a Conservator

As conservator, you have the power and the duty to protect and manage the conservatee's property. This would include gathering the assets of the estate, investing them, and using them for the conservatee's benefit. Your powers and duties, including practical steps you should take, are described in the rest of this chapter.

The judge who appointed you as conservator may limit your powers if the conservatee is still able to take care of some of his or her own finances. For example, a conservatee may not be able to make decisions regarding investments

but (s)he still may be able to pay household expenses. In such a case the judge could give you the power to make investments but allow the conservatee to manage his or her own household budget.

A conservator is said to have a **fiduciary relationship** to the conservatee just as a trustee has to the beneficiaries of a trust. Having a fiduciary relationship means that you have a very special duty to the conservatee to act with more than the usual amount of trustworthiness and care. You must take steps to:

- make sure the conservatee's property is safe;
- budget for the conservatee to make sure his or her needs are met;
- keep careful records of what you have done;
- report to the court and others; and
- make sure the conservatee's finances are kept separate from your own finances.

Some of these requirements may seem to be a lot of unnecessary trouble especially if the conservatee is a close relative or friend whom you have been helping for a long time. However, when you remember the very high degree of responsibility and trust that is being placed in you as the conservator, the reason for this extra care is clear.

You may have helped the conservatee in the past by using a power of attorney⁴ from the conservatee. Although some of your duties as conservator will be similar to what you did under the power of attorney, there are important differences. The power of attorney gave you the power to do things, such as pay bills, for the person (called the **principal**) who gave you the power of attorney. The power of attorney did **not**, however, take away the power of the principal to do such things for himself or herself or to tell you how (s)he wanted such things done.

Unlike a power of attorney a conservatorship **takes away** a conservatee's power over his or her finances and gives it to the conservator. As a result, you are the person responsible for making sure financial decisions are proper. Although you should consult with the conservatee regarding financial decisions when possible, you must use your own judgment in deciding what to do.

Your powers as conservator will end when the conservatee dies except for actions that are necessary to wind up the conservatorship.

⁴Powers of attorney are discussed in a companion manual called **Alternatives to Guardianship and Conservatorship**, which is available from the New Mexico Guardianship Association at guardianshipnm.org.

The **personal representative**⁵ of the deceased conservatee's estate will then take over the management of the estate.

In performing your duties as conservator, it is important to always keep in mind that the conservatee is a human being with dignity and feelings. Even if the judge has given you total control over the conservatee's finances, it is important to consult with the conservatee when possible, to keep him or her informed of what you are doing and, where his or her preferences are reasonable and proper, to do what (s)he would prefer. You do have the ultimate responsibility for making sure that decisions are proper even if the conservatee disagrees with a decision, but this does not prevent you from encouraging the conservatee to continue to be as involved as possible.

Relationship Between the Guardian and the Conservator

If the conservatee has a guardian other than yourself, it is important that you and the guardian communicate with each other and work closely together to meet the conservatee's needs. The guardian is responsible for making personal decisions, including decisions concerning health care and other help that the conservatee is to receive and where the conservatee is to live. The conservator is responsible for using the funds of the conservatee wisely and budgeting them to make sure there is enough to meet the conservatee's needs over the conservatee's expected life. Some decisions such as the appropriate place where the conservatee is to live involve **both** the guardian and conservator. If the guardian and conservator are not getting along with each other or do not take the time to work together, the interests of the conservatee will be harmed. In such a case, the court might change the guardian or conservator or both.

As conservator, you should consider the recommendations of the guardian concerning the needs of and appropriate care of the conservatee. You can follow these recommendations without violating your duties as conservator unless they are clearly not in the conservatee's best interest. You should **not** follow any recommendations that will result in financial benefit to the guardian (other than payment of reasonable fees for serving as guardian). If the guardian will receive a

⁵New Mexico calls the person who manages and distributes your assets after your death a 'personal representative.' Other states call this person an executor or administrator.

financial benefit, such as payment for caring for the conservatee, you can decide whether the recommendation is proper, fair or reasonable. But you should use your own careful judgment and not be influenced solely by the guardian's request.

Relationship Between the Conservator and the Trustee of a Trust

In some cases, the conservatee's assets may already be in a trust that is being managed by someone else (called a **trustee**) for the conservatee's benefit. This could happen, for example, if the conservatee set up a living trust to hold his or her assets before (s)he became incapacitated and appointed someone else to serve as trustee if (s)he became incapacitated.

If you are serving as conservator and someone else is serving as trustee of a trust holding some or all of the conservatee's assets, what are your powers in regard to the trust and the assets in the trust? The answer to this question may be found in the terms of the trust itself, in the terms of any court orders concerning the trust or the conservatorship, and in the rules governing conservatorships and trusts generally.

The trust document itself may spell out your rights as conservator. For example, many trust documents provide that the person creating the trust (which in the case of a revocable living trust would usually be the conservatee) retains the power to change (amend) or revoke the trust. Such trusts often also provide, however, that these powers can be exercised **only** by the conservatee and cannot be exercised by a guardian or conservator. Some trusts allow a conservator to change the trustee of the trust if there is a good reason (the types of reasons are often described in the trust) for doing so.

Sometimes there will be a court order that describes what your powers are in regard to the trust. For example, the order appointing you as conservator may talk about the relationship between you and the trust.

If neither the trust itself nor any court order describes your rights as conservator, the general law regarding trusts and conservatorships will govern. The trustee will generally have the power to control the assets in the trust but you, as the conservatee's representative, would be entitled to information about what the trustee is doing and would have the right to challenge the trustee's actions in court (including to ask that the trustee be changed) if you think (s)he is not acting in the best interests of the conservatee.

Relationship Between the Conservator and an Agent Under a Financial Power of Attorney

The conservatee may have given a financial power of attorney to a person other than you before you were appointed as conservator. If that is the case, you can choose either to allow the person appointed under the power of attorney to continue to act for the conservatee or, **with court approval**, you can **revoke** the power of attorney. If you revoke the power of attorney, you should make sure that all persons or companies that hold assets belonging to the conservatee know that you revoked the power of attorney. If you do not revoke the power of attorney, you will have the responsibility of supervising the person acting under the power of attorney and making sure that (s)he is acting wisely, honestly and for the benefit of the conservatee.

Relationship Between the Conservator and the Conservatee's Spouse

If you are not the spouse of the conservatee and the conservatee has a spouse who is living and not incapacitated, you and the spouse will share the responsibility of managing jointly owned or **community property**⁶ assets. In addition, if the spouse is involved in personal care decision-making for the conservatee, you will need to work closely with the spouse in the same way that you must work closely with a guardian for the conservatee. (See discussion on page 27).

If you feel, in managing jointly owned or community property assets, that the actions of the spouse are unwise or otherwise not in the best interest of the conservatee, you can petition the court to separate the property of the conservatee and the spouse. This is called a **legal separation** or **court-ordered division of property**. One example of a situation in which such action might be appropriate is if the spouse is unwilling to use community property assets to pay for the conservatee's care. After the assets of the spouses are divided out, you would be solely responsible for the management of the conservatee's portion.

⁶Community property means property acquired by either or both spouses during marriage which is not separate property. Separate property includes property acquired by either spouse before marriage or after divorce; property named as separate property in a legal separation or other court order; property received by gift or inheritance; and property named as separate in a written agreement between the spouses. New Mexico law considers community property to belong equally to both spouses, no matter which spouse earned or obtained the property.

If the conservatee is receiving care in a nursing home and has a spouse who is not in a nursing home, it is important that you inform yourself about Medicaid's rules concerning the protection of assets for the at-home spouse. If assets can be protected for the at-home spouse without hurting the conservatee, you should take the necessary steps to do so. This is because the conservatee probably would have done the same thing had he or she had the ability to make such decisions. You may have to obtain permission from the court to gift or otherwise transfer assets to the at-home spouse, however. The Medicaid rules change frequently, and you should consult with an attorney knowledgeable in Medicaid planning to ensure that you take the right action on behalf of the conservatee. The fees for this type of consultation are legitimately paid from the conservatee's estate.

What You Should Do After Becoming Conservator

❶ Get Your Letters of Conservatorship

After the judge appoints you as conservator, you must sign a statement accepting your duties as conservator and promising that you will carry them out faithfully. The clerk of the court will then give you what are called **Letters of Conservatorship** or, simply, **Letters**. These Letters are your proof that you are the conservator. You will be asked to show your Letters when you deal with banks or other companies that hold accounts belonging to the conservatee.

When the clerk gives you your Letters, (s)he will certify one copy without charge. The clerk certifies the Letters by affixing a court seal to a copy of the Letters and signing a notation, which is dated on the day the certification is made, that the Letters are in full force and effect. You can get additional certified copies of the Letters for a small fee. Most banks, after reviewing your certified copy, will simply make a photocopy for their own files. Out-of-state banks, stockbrokers, and other companies will often want you to send them their own certified copy, however, so you may want to obtain enough certified copies for each such company. Stockbrokers will usually want a copy of the Letters that are certified **within 60 days** of the time when you want to use it.

A certified copy of the Letters should also be recorded with the County Clerk of each county in which the conservatee owns land. This will help prevent any property from being sold, given away, or mortgaged without your being informed.

Examples of when to use your Letters of Conservatorship include the following:

- To put in a change of address for the conservatee at the post office;

- To open a bank account for the conservatee's money;
- To transfer the conservatee's bank accounts to the conservatorship account;
- To get into the conservatee's safe deposit box;
- To put the conservatee's stocks, bonds, and other assets into the conservatorship;
- To sign agreements like leases and home-care contracts;
- To request information about the conservatee's affairs from government agencies and private businesses, pension plans, etc.;
- To apply for government and other benefits on behalf of the conservatee;
- To ask lawyers about legal matters, other than the conservatorship, in which the conservatee is involved and
- To gather the conservatee's assets from anyone who has been holding them for safekeeping.

② Give Notice of Your Appointment as Conservator

As soon as you can after your appointment as conservator, you should notify all banks, stockbrokers, credit card companies, and other businesses and government agencies with which the conservatee has an account or a financial relationship or from which (s)he receives money. You should: (1) inform each that you have been appointed the conservator; (2) provide to each a copy of the Letters; and (3) give each an address and telephone number at which you can be reached. A sample letter giving notice is in the Appendix.

Some of the people and institutions that should be notified are the following:

- the conservatee's employer, if the conservatee is working;
- banks, savings and loans, credit unions, and other financial institutions;
- stockbrokers;
- companies in which the conservatee owns stock;
- insurance companies and agents;
- all companies and banks where the conservatee has charge accounts, credit cards, or a bank cash machine (ATM) card;
- government agencies, such as Social Security, from which the conservatee receives payments;
- retirement plans;
- people who owe the conservatee money or to whom the conservatee

- owes money;
- county clerk's office (recording and filing division) in every county where you think the conservatee may own land;
- the post office, if you want the conservatee's mail to be forwarded to your address; and
- anyone involved in a lawsuit by or against the conservatee.

③ **Locate and Identify the Conservatee's Assets and Income**

Along with giving notice of your appointment as conservator, you should locate and identify the conservatee's assets. There may be some assets that you already know about, such as the conservatee's home and checking account, but there may be other assets that you don't know about. It is important to review the conservatee's papers (this may require going through mail that has piled up and sometimes even doing a thorough house cleaning).

You should check the conservatee's **safe deposit box** (if (s)he has one) that may contain stock certificates, certificates of deposit, and other valuable items. If you do not know whether the conservatee has a safe deposit box, ask at the banks where (s)he has accounts since, if (s)he has a box, it is most likely to be at one of those banks. When you first open the safe deposit box, you can request that a bank officer go with you and prepare a list of what is inside the box. This is a free service of the bank that is worth using. That way, if anyone later has a question about what was in the safe deposit box, you will have a list prepared by the bank officer.

You should make arrangements with the post office to have the conservatee's **mail** sent to you. By reviewing the mail, you may discover account statements and other information that will tell you about the conservatee's **assets**. If the conservatee has an accountant or other tax preparer, (s)he may be able to give you information about the conservatee's assets. If the conservatee has a will that was prepared by a lawyer, the lawyer will often have a list of the conservatee's assets at the time the will was prepared. The conservatee's lawyer should be willing to share such information with you since you are now the conservatee's legal representative. The conservatee's past tax returns should give you information about the conservatee's income and may tell you from whom (s)he was receiving income, which may lead you to additional accounts and other property owned by the conservatee. Often friends and family members are a good source of information.

Some types of assets to look for include:

- cash;
- uncashed checks and refunds;
- bank accounts (including checking, savings, and certificates of deposit);
- stocks;
- bonds;
- promissory notes (IOUs);
- partnerships and other business interests;
- life, health, long term care and other insurance policies;
- real estate, including houses, land, ranches, and mineral rights;
- furniture and/or antiques;
- artwork;
- jewelry;
- valuable collections; and
- vehicles, including cars, trucks, boats, campers and RV's.

Sometimes conservatees are wary or afraid and have hidden some of their assets. You may need to search the house, garage, under furniture, in the refrigerator and other hiding places to locate valuables.

In addition to finding out what property the conservatee owns, you should also find out what **income** the conservatee is receiving or has a right to receive. This is very important because one of your duties as conservator is to make sure the conservatee receives the income (s)he has a right to receive. Some types of income the conservatee may be receiving or may have a right to receive include:

- government benefits such as Social Security, Supplemental Security Income (SSI), veterans', disability, or welfare⁷;
- insurance benefits;
- wages, severance pay, or disability, vacation, or sick leave owed to the conservatee;
- pensions;
- settlements from divorce, injury or other lawsuits;
- payment of debts owed to the conservatee including payments from real estate contracts;
- money from trusts;

⁷The conservatee may not have applied for all the government benefits to which (s)he is entitled. The conservator may have to apply for these benefits on behalf of the conservatee. For example, if you know that the conservatee served in the military, you should research the eligibility requirements and, if appropriate, apply for veteran's benefits for the conservatee, including Aid and Attendance if applicable.

- rental income; and
- annuities.

④ Find Out How the Conservatee's Assets are Titled

Along with finding out what assets the conservatee has, it is very important to find out how the assets are **titled** (whose name is listed as the owner of the asset). For example, if the conservatee has a bank account, it is important to find out if the conservatee's name is the only name on the bank account or whether someone else's name is also on the account. Accounts that are held in more than one name are called **joint accounts**.⁸

Joint accounts can be difficult to deal with for two reasons. First, you must find out who really owns the money in the account. Under New Mexico law, joint accounts held by people who are not spouses are **not** automatically owned half and half. Rather, the person who put the money into the account is usually considered the owner of those monies during the lifetime of both of the joint account holders.

As a result, if it was the conservatee who put the money into the bank account and added a child's name to the account (for example, to help write checks on the account), all the money in the account will usually be treated as belonging to the conservatee. If the other person put money into the account, that person will usually be considered to own what (s)he put in. If that is the case, it is usually best to divide out the conservatee's money from that belonging to the other person and put them into separate accounts. As conservator you will then be able to fully control the account with the conservatee's share of the money.

The second reason why joint accounts are difficult to deal with is that they usually have what is called a **right of survivorship**. This means that if one of the persons whose name is on the account dies, the account will go automatically to the other person. As we will discuss below, you have a duty to try to "preserve the conservatee's estate plan" to the extent that you can while at the same time making sure that the conservatee's needs are fully met. If the conservatee has set up joint accounts that will pass to certain people when the conservatee dies, you must try to manage the conservatee's estate in a way that the same people will receive that property (or what is left of it) after the conservatee dies. This can be a very tricky and difficult task.

Even if an asset is only in the conservatee's name, you should check to see if the conservatee named any **beneficiaries** to receive the asset after his/her death.

⁸Joint accounts are also called joint tenancy accounts. Joint tenancy is discussed in a companion manual called **Alternatives to Guardianship and Conservatorship**, available from the New Mexico Guardianship Association at guardianshipnm.org.

Life insurance policies, individual retirement accounts, certificates of deposit, and many other assets allow the owner to name a **payable on death (POD)** or **transfer on death (TOD)** beneficiary to receive what is left of the asset after the conservatee dies. Although POD and TOD beneficiaries have no rights to an asset until after the conservatee dies, it is important to know who the POD and TOD beneficiaries are so that one can preserve the conservatee's estate plan to the extent possible. A Transfer on Death Deed may be needed. A more detailed discussion on Transfer on Death Deeds is in the next section (Real Estate).

If the conservatee is married, you must find out whether property is **community property** that belongs to both spouses or the **separate property** of one spouse or the other. (See footnote 6 on page 30 above.) The title of an asset does not necessarily tell you whether it is community or separate. For example, an individual retirement account that contains monies earned during the spouses' marriage is community property even though it is only in the name of one of the spouses. If property is community property and you are not the spouse of the conservatee, you and the spouse will have to work together to manage the property since neither of you will have total control over the community property. It may be necessary in some situations to divide out the community property if there is too much disagreement on how assets are to be managed and spent.

⑤ Take Control of the Conservatee's Assets

After identifying the conservatee's assets, it is very important that you take control of them. As conservator, you are now responsible for making sure that the conservatee's assets are safe. Unless you take control of the assets, you will not be able to make sure of their safety.

Real Estate

The words **real estate** generally refer to land and the buildings on it. Title to real estate, including the conservatee's home, can be left in the conservatee's name, but title companies frequently require that the property be re-titled into the conservatorship estate if it is to be sold. As a general rule, it is best to re-title any property owned by the conservatee into the conservatorship estate with a new deed. Have an attorney assist you with this to ensure the deed is prepared correctly. Make sure that you **record** a certified copy of your Letters of Conservatorship in every county in which the conservatee owns real estate. Record the Letters in the county clerk's office in the county where each property is located. That way, anyone who may want to buy the real estate from the conservatee or lend money to the conservatee secured by a mortgage on the real

estate will have notice of the conservatorship.

If real estate is owned jointly by the conservatee and another person in joint tenancy or as tenants in common, you should consult the other person before selling, encumbering or improving the property. If property is held in joint tenancy, deeding the property to a conservatorship could sever the joint tenancy. Consult an attorney to be sure a problem will not be caused by severing the joint tenancy, and to ensure you understand the ramifications of selling property owned jointly by the conservatee and other persons.

A Transfer on Death Deed (“TODD”) is a way to avoid a probate of the conservatee’s estate with respect to real estate. TODDs offer numerous benefits to the conservatee’s heirs without endangering the conservatee’s interest in the property. You may feel that the execution of a TODD is in the conservatee’s best interest to ensure that the estate plan of the conservatee is maintained.

Any real estate owned by the conservatee may already have a TODD in place. In the event that real estate is sold, the TODD is effectively revoked without any further action. If a replacement property is purchased, you should consider whether or not it is appropriate to do a TODD for the replacement property.

Although the statute does not specifically authorize a conservator to execute a TODD (see NMSA 1978 § 45-6-401 (2001)), theoretically conservators can do anything the record owner of the property could do. If you feel a TODD may be appropriate, you should discuss this with an attorney.

It is very important that you make sure that the conservatee's real estate is adequately **insured**. Insurance for real estate with a building on it, including the conservatee's home, should include fire, vandalism, and liability insurance. Make sure insurance is current and that the amount of the insurance coverage is sufficient to cover any loss.

Most homeowner's insurance policies contain a provision that the fire and vandalism coverage will lapse or become no longer good if the home is **vacant** for more than a month unless you pay an additional amount for a "**vacancy rider**." However, vacancy riders are very difficult to obtain. As a result, if no one is living in the conservatee's home, such as if the conservatee is in a hospital or nursing home, you should tell the insurance company and purchase a vacancy rider, if possible.

As conservator, you are responsible for making sure the conservatee's property is reasonably safe. If there are unsafe conditions on the conservatee's property, you should make sure such conditions are corrected. For example, if there are vacant buildings on the conservatee's property that are beginning to fall apart, you should board them up or remove them. You should also take steps to make sure the property is physically secure. For example, if any person whom

you may not want to enter the conservatee's house has or may have a key to it, you should change the locks to the house.

Lastly, you should make sure that the property taxes are paid up if they are not being paid by a mortgage company.

Bank Accounts

The title of all bank accounts should be changed to **Conservatorship of [conservatee's name], [your name], Conservator**. If you cannot change the title of accounts such as Certificates of Deposit without losing interest on the account, wait until such accounts mature and then change the title. Even with such accounts, however, make sure that the banks have noted in their records that you are the conservator. **The conservatee's social security number should be used on all the accounts rather than your own.**

As discussed above, accounts that have more than one name (joint accounts) create special problems. You will have to find out who put the money in the account to know who owns it. Until you have found this out, you should inform the bank **in writing** not to allow anyone to withdraw money from such accounts.

Safe Deposit Boxes

The title to the conservatee's safe deposit box, if (s)he has one, should be changed to **Conservatorship of [conservatee's name], [your name], Conservator of the Estate**. If the conservatee is renting a box with someone else, you should have that person look at what is inside the box with you. Items belonging to the conservatee should be separated from those belonging to the other person. The safe deposit box should then be put into only the conservatorship's name, and you should have the only key to the box.

Stocks and Bonds

All stocks and bonds should be reissued to **Conservatorship of [conservatee's name], [your name], Conservator**. The conservatee's social security number should be used on the IRS Form W-9⁹ that you will have to fill out. Before a company will reissue stocks and bonds, it will usually require that

⁹A Form W-9 is a Request for Taxpayer Identification Number and Certification. The number reported on the W-9 is usually the taxpayer's Social Security number, but could also be an employer identification number for certain trusts or estates.

certain forms be sent, including: (1) an affidavit of domicile; (2) a stock power; (3) a letter of instruction; and (4) the original stock certificates. Your signature on some of these documents will need to be **signature guaranteed**, sometimes referred to as a “medallion guarantee”. This is different from notarization and generally can be done by a bank officer or your stockbroker. In addition, companies usually require that you send them Letters of Conservatorship that have been certified by the court clerk **within the last 60 days**.

Some stock certificates may be missing. For example, suppose the conservatee is receiving dividends from stock but you cannot find the stock certificates. First ask the conservatee's stock broker if (s)he is holding the certificates. If not, you should write to the stock company and ask that replacement certificates be issued. The replacement certificates should be titled as noted in the paragraph above.

Some companies do not issue paper stock certificates so each stockholder owns “certificateless” shares. Certificateless shares are recorded by the company or its stock transfer agent, so that all records of ownership are only shown on the books of the company or the stock transfer agent. Thus, it is also possible that the conservatee owns these kinds of shares in one or more companies. If you see any check stubs or other documentation that indicate ownership of shares but cannot find a paper stock certificate, you should contact the company to make sure the stock records are changed to reflect the conservatorship accordingly.

Cars and Other Vehicles

You should change the title to cars, boats, RVs and other vehicles to **Conservatorship of [conservatee's name], [your name], Conservator**. Don't let anyone use the conservatee's car except if it is being used for the benefit of the conservatee (such as to take the conservatee to the doctor). Make sure there is car insurance that covers any damage to the car and any liability that might arise if there is an accident. If you let someone use the conservatee's car (even to help the conservatee) and they get into an accident, the conservatee's estate may be sued.

Sometimes the conservatee will want to continue to drive even though it is not safe. In such a case, it is part of your responsibility as conservator to take reasonable steps to prevent the conservatee from driving. If the conservatee's doctor writes a letter to the Department of Motor Vehicles (DMV) stating that it is unsafe for the conservatee to drive, DMV will take away the conservatee's drivers' license. You can take practical steps to prevent the conservatee from driving, such as taking away the car keys or selling or disabling the car. If the conservatee has a guardian other than yourself, you should consult with the guardian. If possible, the two of you should work together to solve this problem. If (1) you know that it

is unsafe for the conservatee to drive, (2) you do not take reasonable steps to prevent him or her from driving, and (3) (s)he gets into an accident and gets hurt or hurts others, you may be legally responsible because you were not reasonably careful in carrying out your duties as conservator.

Check to see if there are driving schools offering testing for a fee, and, if after the test, if the instructor will then offer a recommendation to get a license, private lessons, or not to drive at all. A letter of concern can also be written to the Motor Vehicle Division, Driver Services Bureau in Santa Fe (MVD 888-683-4636), or a "Report of Driver with Dementia" form from the DMV can be sent anonymously.

If the conservatee does not need the car, it should probably be sold since it will decrease in value as time passes.

Credit Cards, Charge Accounts, and Bank Cash Machine Cards

It is usually best to cancel all credit cards, charge accounts, and bank cash machine (ATM) cards in the conservatee's name. These can be too easily misused by the conservatee or others. If credit cards have already been misused, you may be able to avoid paying the charges (see discussion on page 41).

Debts Owed the Conservatee

As conservator, you should try to make sure that all debts owed the conservatee are paid, unless doing so would not be worth it to the conservatee. Sometimes this may be easy, such as if the conservatee owns a real estate contract and the buyer is regularly paying on the contract. Sometimes this may be hard, such as when another person has stolen money from the conservatee and will not pay it back. It is best to speak with your lawyer about such cases. (S)he will help you decide what should be done.

Individual Retirement Accounts (IRA's) and Pension Accounts

You may not be able to change the title to IRA's pension accounts, and other retirement accounts without causing income tax to have to be paid on the monies in such accounts. If that is the case, don't change the title but make sure that the company holding the account knows that you are the conservator and that you are the only one that can withdraw money from the account.

If the conservatee has IRA and pension accounts, you must make sure that the monies in these accounts are being withdrawn properly. If the conservatee withdraws money too early, there may be a penalty. After the conservatee reaches

a certain age (usually by **April 1** of the year **after** the conservatee becomes 70 1/2 years old), the conservatee **must** withdraw at least a certain amount from the IRA and pension accounts each year. If (s)he does not, there is a fifty percent (50%) penalty on the amount that should have been withdrawn but was not. Dealing with IRA, retirement and pension accounts is a tricky area and making a mistake can cause the conservatee to pay a lot in tax penalties. It is best to talk with your lawyer or CPA about how to best take money out of these accounts.

Social Security and Other Income Benefits

You will have to deal with the Social Security Administration regarding the conservatee's social security benefits, such as having them directly deposited into an account other than the one into which they were being deposited when you became conservator. You will have to become the **representative payee** or **rep payee** of such benefits. This is true even though you have already been appointed conservator. You can become the representative payee by going to the Social Security Administration office and filling out its forms to become representative payee. Usually, if you are already the conservator, Social Security will appoint you to be representative payee without much difficulty.

You should also tell (in writing) any other persons or entities from whom the conservatee is receiving income, such as the Veterans' Administration, the Civil Service Retirement System, and pension companies, that you are the conservator. Ask whether there is anything else needed for you to become the conservatee's representative for such income.

Other Assets

The title to the conservatee's other assets should generally be changed to **Conservatorship of [conservatee's name], [your name], Conservator**. If that is not possible, the person or company holding such assets should be informed that you are the conservator and that only you have the power to sell or otherwise deal with the assets.

⑥ Make an Inventory of the Conservatee's Assets

You should make a list of all of the conservatee's assets as of the time you are appointed conservator and the value of each of the assets. You are required to file an **Inventory and Appraisal** listing such assets and their value **within 90 days** after you are appointed as conservator. This information will also be helpful in your own record-keeping.

You don't need to spend a lot of money valuing assets in order to prepare the inventory and appraisal. Assets such as bank accounts, mutual funds, and publicly traded stock should be easy to value. You can use estimates for such items as real estate and do not need to get a formal appraisal unless you are selling such assets. You do not need to list each household item, but can lump categories of items together, such as "all household furnishings." If there are items of unusually large value, however, such as an expensive antique, it would be worth listing such an item separately.

⑦ Find out What Debts the Conservatee Owes and Decide Which Debts Should be Paid

In addition to finding out what assets the conservatee has, you should also find out what money the conservatee owes to other people. Make a list of all such debts. Such debts might include:

- a mortgage or home equity loan on the conservatee's house or other real estate;
- amounts owed on the conservatee's credit card;
- taxes;
- utility bills;
- insurance premiums; and
- other loans or past due bills.

If the conservatee has been disabled for some time, (s)he may have stopped paying bills. One of your most important tasks will be to figure out what (s)he owes and make sure these bills are paid as soon as possible. Otherwise, there may be bad results such as health insurance lapsing (being canceled) because (s)he didn't pay the premiums, the home being foreclosed because (s)he didn't pay on a real estate contract or mortgage, the utilities being shut off, or penalties being imposed as a result of late payment on credit card bills and other debts. Before paying penalties, see if you can get them waived by explaining that the conservatee was disabled. For example, the Internal Revenue Service will waive penalties on past due taxes if the taxpayer failed to pay as a result of disability. Credit card companies may waive late fees and/or finance charges if you ask them.

In figuring out what debts the conservatee has, it is your responsibility to check the debt and decide whether it is valid. You should challenge debts that you feel are not valid. For example, it might be that someone made charges on the conservatee's charge account without the conservatee's permission or that the conservatee was too disabled to really give permission. If that is true, you may not

have to pay for those charges. If you inform the credit card company **in writing** right away, it might be able to cancel the charges before they are paid. The same is true if someone forged or wrote unauthorized checks on the conservatee's checking account. The bank should not have paid such checks and it may have to credit the conservatee's account if it did.

Another situation might be that someone is claiming that the conservatee owes him or her money for helping the conservatee. Before paying, you should look into whether the conservatee really owes the money by asking for some proof that the services were really performed. You should also decide whether the amount the conservatee is being charged is too much. If you believe that the conservatee does not owe a debt that is being claimed or that the conservatee was unfairly taken advantage of (which often happens to disabled people), you should consult with your attorney before deciding what to do.

In finding out what the conservatee's debts are, it is important to review the conservatee's papers and mail. It is worth giving possible creditors like the health insurance company, homeowners' insurance company, and mortgage company a call to make sure the conservatee is current on payments. If you think the conservatee may not have paid taxes, you can find out whether or not (s)he has been filing returns or paying taxes from the IRS by requesting a transcript.

When you have learned what the conservatee's debts are and decided which are valid, you can then set up a payment schedule or use a computer program to make sure they are paid on time.

⑧ Arrange to Have the Conservatee's Mail Sent to You

It is usually best to have the conservatee's mail sent to you. As mentioned above, looking at the conservatee's mail is a good way to find out about assets and debts of the conservatee that you might not know about. By having the conservatee's mail sent directly to you, you can also make sure that you get all bills (such as for insurance premiums) and pay them on time. If possible, have the conservatee's creditors send mail directly to you so that the conservatee can receive any personal mail directly. If you are having the personal mail sent to you, be sure to get it to the conservatee as soon as possible, in accordance with his or her decisional and emotional best interest.

Another reason to have the conservatee's mail sent to you is that there are a lot of companies that send junk mail that try to get people to buy things or donate money. Some are not harmful but there are others such as certain "sweepstakes" companies or lotteries that try to get people to send more and more money in the hope of winning. These companies often end up unfairly taking advantage of people who are elderly or disabled. If you are receiving these mailings, send them

a letter asking them to remove the conservatee from their mailing lists.

Managing the Conservatee's Estate

Keep the Conservatee's Money Separate From Your Own

It is very important that you do not mix the conservatee's money with your own money. Mixing the money can get you into serious trouble. Therefore, **never** put the conservatee's money into your account or your money into the conservatee's account. This “**commingling**” of assets is prohibited.

Protecting the Conservatee's Important Papers and Valuable Items

If the conservatee does not have a **safe deposit box**, you should consider renting one for him or her. Important papers, such as the following, should be kept in the safe deposit box:

- the conservatee's will or other estate planning documents;
- stock certificates;
- bonds;
- real estate deeds;
- vehicle registration documents;
- promissory notes (IOUs);
- insurance policies;
- birth, marriage and death certificates;
- the conservatee's passport; and
- any other papers that would be hard or impossible to replace.

Other small valuable items such as jewelry should also be kept in the safe deposit box unless you decide that it is more important to let the conservatee keep them than it is to make sure that they are safe.

Even though you might feel it would save money, you should **not** put the conservatee's valuable items and papers in your own safe deposit box. It is very important to keep your property separate from the conservatee's property. The one thing that can get you most easily in trouble is to mix the conservatee's money or other assets with your own.

The conservatee may have valuable items, such as expensive artwork, that cannot be placed in a safe deposit box. You should consider storing them in an

insured warehouse, with appropriate art storage conditions, unless the conservatee wants to keep them at home and it would be reasonably safe to do so. You should take photos or make a video tape of all valuable items especially those that you are leaving in the house. You should also make sure that valuable items are insured against loss. This can usually be done by adding items to the conservatee's homeowner's or renter's insurance policy. Such policies usually allow you to list valuable items individually. The insurance company may charge an extra premium for insuring specific valuable items.

If the conservatee is living at home, you will often have in-home caregivers coming in to help the conservatee. Unfortunately, sometimes caregivers take things belonging to the conservatee when they should not do so. In some of these cases, the conservatee will not know that the item was taken but in some the conservatee will have "given away" the item. In either case, it would be wrong for the caregiver to take the item without your permission.

It is very important to carefully check the references of such caregivers whether or not you (or the guardian) are hiring through an agency. If you are hiring through an agency, make sure the agency screens, bonds and insures its employees. In particular, make sure the agency does a criminal background check of its employees. Agency employees have more oversight and accountability than non-agency employees. If the caregiver cannot come to work, an agency can usually provide a substitute more easily as well. The agency will also ensure that taxes and other work-related issues are taken care of so you do not have to do that additional work as the conservator. Agency employees are sometimes more expensive, but the overall benefit for the conservatee is generally worth the expense.

It is also a good idea to inform the caregiver that you have taken an inventory of valuable items and will be checking on the items from time to time. This can be done without offending the caregiver by simply explaining that this is part of your duties as conservator and you do not mean to imply that this particular caregiver will take anything.

Investing the Conservatee's Assets

If your conservatee has enough assets to invest, you are responsible, as conservator, for making sure that the conservatee's assets are properly invested. On the one hand, you do not want to make risky investments. On the other hand, you want the conservatee's assets to make a reasonable income if it can be done safely.

Unless you are an expert in investments, it is best for seek professional help from a good financial planner. Be careful in choosing a financial planner. Check

references. Ask your lawyer, accountant, and trusted friends for referrals. There are many people who say they are financial planners but who are not actually well-qualified to advise you. Some planners may have an interest in selling you a particular product rather than advising you based on your own needs. Because the amount of money that many financial planners make depends on the type of investments they sell you, you want to make sure that the financial planner you choose is both knowledgeable about investments and honest. You do not want to go to someone who will recommend investments based on what they will make in commissions from the investments rather than what is good for the conservatee.

If the conservatee already has a financial planner, you can use that person. It is still your responsibility to check into that person's background and references to make sure the person is appropriate. Remember that while you want to do what the conservatee would like you to do if that is appropriate, you are the person ultimately responsible for the conservatee's finances. Therefore, you must make your own decision regarding who would be a good financial planner and what would be good investments for the conservatee.

After you have selected a financial planner, (s)he should review the conservatee's investments and make recommendations. You want to know if the investments are appropriate given the conservatee's needs, age, life expectancy, income requirements and financial resources. The investments that the conservatee already has may be proper and nothing may need to be done. If changes are recommended, you can consider making them. If the conservatee is still able to participate in such decisions, discuss the recommendations with the conservatee and consider his or her opinion. As always, if what the conservatee would like to do would not be harmful to his or her finances, you may follow his or her preferences. However, you are the one who is ultimately responsible for the finances and you must make your own decisions.

If you are investing in certificates of deposit or other bank accounts, do not put more than the Federal Deposit Insurance Corporation (FDIC) insurance limit (currently \$100,000.00) in any one bank or credit union. If you put more than \$100,000 in one bank or credit union, and that organization fails, you will lose part of the conservatee's money.

Make a Budget

As conservator, you have the duty to wisely manage the conservatee's assets for his or her benefit. A very important part of this duty is figuring out what the conservatee needs and balancing this with what (s)he can afford.

If the conservatee has a guardian other than yourself, you should work closely with guardian in making a budget. You should figure out the needs of the

conservatee and how much it will cost to meet those needs. You can estimate a range of costs of meeting the conservatee's needs, depending on what (s)he can afford. For example, if the conservatee needs nursing home care, some nursing homes are nicer than others but cost more. After figuring the range of possible costs, look at the conservatee's income and assets and determine what (s)he can reasonably afford. Take into account what you predict will be the future needs throughout his or her lifetime.

In deciding what the conservatee can afford, keep in mind that the conservatee's assets are for his or her benefit during his or her lifetime. While you should not waste the conservatee's assets on things that will not make a difference, your focus should not be on saving the conservatee's assets for those who will receive the assets after the conservatee dies. The conservatee's assets may be needed now to give as good a quality of care and of life as (s)he can afford. Those assets should be used to do that even if it will reduce (or use up entirely) the conservatee's assets. It is your responsibility as conservator to put the conservatee's needs **first, not** to save the conservatee's assets for those who will inherit from the conservatee after death.

Set up a Conservatorship Checking Account and Keep Good Records

It is very important to keep good records that show all income that the conservatee receives and all payments that are made from the conservatee's money. This is not hard and you do not need a fancy computer program to do it well.

It is very helpful in keeping good records of income and payments to have one checking account into which all income is deposited and from which all payments are made. You can set up a new account in the name of the conservatorship, that is **Conservatorship of [conservatee's name], [your name], Conservator**, or use one of the conservatee's existing checking accounts after changing the title into the name of the conservatorship. The second option might be easier if it is already the account into which the conservatee's social security benefit and other income are being directly deposited.

Whichever method you choose, be sure to keep the conservatee's money in a separate account(s). **Do not use an account that is a joint account with another person, however, unless the other person's name is removed from the account.** If the account is still a joint account with another person, any monies in the account will automatically pass to the other person when the conservatee dies. You, as conservator, should not be putting income into and making payments from such an account. **For purposes of record keeping, it is best to use a checking**

account in which the bank returns all canceled checks and deposit slips to you, or provides images of checks and deposit slips.

After you have chosen one account, have all income deposited into that account even if you intend to later transfer the income to another account (for example, in order to let it earn more interest than it would in the checking account). This would include income such as the conservatee's social security benefits, pension benefits, and payments from annuities. You should also consider having dividends from investments and interest from certificates of deposit paid into this one account. This will make it easier to keep track of such income for purposes of accounting to the court. You may find it more convenient and easier to track activity with an account that is accessible online.

As income is deposited into the account, carefully note on the check register: (1) the amount of such income; (2) where it was from; and (3) when it was deposited. If you are depositing income from more than one source in a single deposit, break out in the check register each different source of income. For example, show how much of the income is due to a payment on a real estate contract, how much is reimbursement from the insurance company for prescription medications, etc. If it is not too difficult, make a photocopy of each check that is being deposited. Many convenience stores and supermarkets have photocopier machines you can use if you do not have one yourself.

In addition to depositing all income into this one account, make all payments from this account. Carefully note in the check register: (1) the check number; (2) to whom the check was made; (3) what it was for; (4) when it was made; and (5) the amount of the check. You may find it useful to use checks that allow you to keep a duplicate, or carbon copy, as each check is written. If you need to make a large payment and there is not enough money in the checking account to make the payment, transfer money from another account into the checking account, note in the check register where the transferred money is from, and then make the payment from the checking account. Keep the receipts you receive for payments made and write the number of the check on the receipt. File the receipts in chronological order by date. Or, you may categorize by the name of the payee or the subject. A large expanding file is good for this purpose. In addition to check registers and receipts, keep account statements and other documents that show you are doing your job as conservator.

You should make payments from the conservatorship estate by check directly to the person you are paying if at all possible. Do not make checks for cash or make cash withdrawals from the checking account unless absolutely necessary. An exception to this rule might be if you are giving a small cash allowance as spending money to the conservatee each week. If you do make cash withdrawals, carefully note in the check register what the money was used for and

keep **receipts** if possible. A lot of cash withdrawals will not look good to the court or to other family members who may have questions regarding your management of the estate. For your own protection, keep cash withdrawals to the very minimum possible.

Selling or Borrowing Against Estate Assets

If there is not enough money in the conservatee's estate to pay expenses, you may have to sell assets to meet those expenses. Before selling assets, there are several things to consider.

First, selling an asset may affect the conservatee's eligibility for Supplemental Security Income, Medicaid and other governmental benefits. This is particularly true if you sell an asset, such as the conservatee's home, that is considered exempt by these programs. For example, the Medicaid program that helps pay for nursing home care will consider a conservatee's home to be exempt as long as the conservatee wants to return home. This is true even if the conservator's health is such that (s)he cannot return home. If the home is sold, however, the money received from the sale will not be exempt and the conservatee may no longer be eligible for Medicaid assistance.

Second, selling an asset may have income tax or capital gains tax consequences. If you are not sure what the tax consequences of a particular sale would be, speak with an accountant or a lawyer who knows about these taxes **before** you sell an asset.

Third, if you sell an asset that is specifically given away in the conservatee's will (for example, if the conservatee specifically gives the car to one of the children in the will), the person who would have received that asset may be entitled, after the conservatee's death, to the amount that the conservatee received from the sale. As a result, make sure you keep careful records showing how much you received as a result of the sale and showing that you received a reasonable amount of money (fair market value) for the asset. This will be discussed in more detail below.

Fourth, before you sell the conservatee's home, you should consider alternatives such as getting a home equity loan or a reverse mortgage (where the bank will pay the conservatee a monthly amount in exchange for a mortgage that will be paid back when the house is sold). You can research options by finding publications from various resources or using the Internet. Some organizations have information on their websites that can give you information on these alternatives. As is true of all websites and publications that are distributed in more than one state, however, the website or publication may not take into account rules that are specific to New Mexico. Therefore, before acting on any of the

suggestions, it would be a good idea to speak with a New Mexico lawyer regarding how the action you are considering will be treated under New Mexico law, including Medicaid rules.

Lastly, whenever you sell property, make sure you are getting **fair market value** for it. Fair market value is the amount of money which a purchaser who is willing [but not obligated to buy] would pay the owner [who is willing but not obligated to sell] of the property. In other words, you must ensure that you are selling the property for the best price you can get.

If you are selling publicly traded stock or mutual funds shares, knowing the value on the date of the sale will be easy. If you are selling real estate, however, you should obtain an appraisal or at least a market analysis from a competent realtor. You want to have good records showing that you received fair value for the sale, how much you received, and when you received it. This is especially true if you are selling to a family member or a friend since it is more likely in such cases that a question may later arise as to whether you received fair value. **Do not sell an asset to a family member for a greatly reduced price.** Doing so is a breach of your fiduciary duty as conservator and could cause you to be removed by the court.

Obtain Adequate Insurance

You should make sure that the conservatee has adequate health and property insurance. You should also review other insurance policies such as life insurance to make sure they are appropriate. Find out if the conservatee has long term care insurance and what it might cover.

If the conservatee already has health insurance policies, review them carefully. Sometimes the conservatee has been taken in by misleading advertising and purchased too much insurance. For example, (s)he may have several policies covering the same things. In such a case, you should cancel the unnecessary policies. If the conservatee does not have adequate health insurance coverage, such as if (s)he needs a supplement to Medicare coverage, or a Medicare Part D drug coverage program, arrange to purchase a policy that will cover the needs. As is always true, if you are not an expert in this area, it is worth consulting someone who has special knowledge in the area of health insurance. An insurance expert can advise you on what the conservatee needs and how to obtain the best policy for the conservatee.

A Benefits Counselor through the state Area Agency on Aging can provide helpful information about insurance benefit programs and Medicare Part D drug coverage issues. Call 1-800-432-2080 to help you locate the office in your area.

If the conservatee owns a home or other real estate, you should make sure

(s)he has adequate insurance that will cover damage to the property and lawsuits that might be brought by persons who may be injured on the property. If the property is vacant, you will probably need to purchase a "vacancy rider" (see page 36). If the conservatee is being cared for in her home, make sure that there is insurance that will cover work-related injuries of those that you hire to help her.

If the conservatee owns any automobiles or other motor vehicles, make sure that they are covered by enough insurance both for damage to the vehicle and for any lawsuits that may be brought against the conservatee (or any person you let drive the car) because of an accident. (See previous discussion on page 38.)

Review any life insurance policies owned by the conservatee. Some policies that the conservatee is still paying on might not be worth keeping. Have the conservatee's financial planner review any life insurance policies and make recommendations regarding what to do.

File Insurance Claims

As conservator, you should make sure that insurance claims, particularly health insurance claims, are filed in a timely matter. This is an important and often very time-consuming task.

Pay Taxes

You are responsible for filing the conservatee's **income tax returns** and making sure that all taxes owed are paid. If you have hired an aide for the conservatee, you may be responsible for paying payroll taxes such as Social Security, Medicare, and unemployment insurance. Check with your lawyer or CPA if you have any questions about this. If you hired the aide through an agency, the agency may be responsible for paying these taxes.

Sometimes you will find that the conservatee owed taxes but did not file a tax return or pay taxes for several years. It is your duty to correct this problem by filing the late returns and paying the taxes from the conservatee's estate. If the conservatee did not file tax returns or pay taxes as a result of disability, the IRS will waive any penalties for late filing, but that will have to be explained to the IRS representative.

Many long term care expenses, including payments for nursing home care, and sometimes home care or residential care home fees, are deductible as medical expenses. This may greatly reduce or eliminate any taxes that are owed by the conservatee.

If the conservatee does not have much income, it may not be necessary to file an income tax return for him or her. Check with a tax preparer or the IRS to

find out how much income the conservatee can have before an income tax return must be filed.

You may hire an accountant or other tax preparer to prepare the conservatee's tax returns. As is true in other areas that require special knowledge, paying someone who knows what they are doing is usually worth while.

The Conservatee's Will and Estate Plan

As conservator, you have the right to look at the conservatee's will, trust, and any other writing (such as accounts that name a payable on death beneficiary) that tells you to whom the conservatee wants to leave his or her property after (s)he dies. This is important because one of your duties as conservator is to try to manage the conservatee's estate (to the extent that this is possible while providing first for the needs of the conservatee), in a way that does not change who receives the conservatee's property after the conservatee dies. Also, if the conservatee has given a specific item to someone in the will - for example, the house to one daughter - if you sell the house before the conservatee dies, the daughter will be entitled, after the conservatee dies, to receive the net amount that was received from the sale, subject to the amount of the remaining estate. **You can create a trust on behalf of the conservatee if this is in his/her best interest, but the court must approve it. Consult an attorney for this issue.**

Sometimes performing your duties as conservator in a way that does not change who will receive the conservatee's property after death (this is called **preserving the conservatee's estate plan**) can be tricky. For example, the conservatee's will might provide that all stocks (s)he may own when (s)he dies will go to one son while all bank accounts that (s)he owns will go to a daughter. If you take money from bank accounts and invest it in stock or sell stock and put the money you receive in a bank account, you are affecting what each child will receive after the conservatee's death. Another example might be where the conservatee owns three certificates of deposit (C.D.), each of which lists a different payable on death beneficiary, and you need to cash in one C.D. to pay for the conservatee's care. If you pick one C.D. to cash in, the person who is the payable on death beneficiary of that C.D. will lose out. In such a case, you might consider cashing in all the C.D.'s and setting up a new account on which **all** beneficiaries of the three C.D.'s are listed as beneficiaries after the conservatee's death.

As you can see, the duty of preserving the conservatee's estate plan can be very difficult. If you are managing an estate where it is difficult, you should discuss the problem with your lawyer **before** selling assets or making any other decisions that affect who will receive the conservatee's property after death.

If you have any doubt or question about what needs to be done, you should consult a lawyer and possibly obtain court approval for the action you wish to take. If you have the conservatee's will, trust or other estate planning papers, be sure to keep them in a safe place, preferably in the conservatee's safe deposit box. Some lawyers have fireproof safes where they keep important papers for their clients. This would also be a good place to keep such papers.

If the conservatee's estate is large enough, **estate taxes** would have to be paid after death. Individuals whose estates at death total more than \$2,000,000 or couples whose estates total more than \$4 million have **taxable estates**. This means that the amount of the assets over \$2,000,000 (minus certain deductions) is subject to estate tax. Estate tax rates are generally greater than forty percent. A U.S. Estate Tax Return, Form 706, must be filed if an estate exceeds \$2,000,000 (in 2006). Filing this return would be the responsibility of the personal representative of the estate after the conservatee dies.

Under federal law the amount of an estate subject to estate tax will increase. For 2007 the amount excluded from federal estate tax remains \$2,000,000. In 2009, the amount increases to \$3,500,000. In 2010, the tax is repealed. In 2011, the excluded amount will be \$1,000,000 permanently, unless Congress changes the law. You should discuss with your lawyer whether any steps can be taken to reduce estate taxes owed by the conservatee.

Deal with Medicare, Medicaid and Other Public Benefits

One of your duties as conservator is to find out what public benefits the conservatee may be eligible for and to obtain those benefits for the conservatee if doing so makes sense. This is particularly important if the conservatee is in a nursing home or otherwise needs long term care and may be eligible for Medicaid assistance.

The rules for qualifying for Medicaid are very complex and are beyond the scope of this Handbook. It is worth speaking with a lawyer who knows about public benefits to find out what benefits the conservatee may be entitled to receive. This may affect the way you manage the conservatee's estate. For example, even for a single person, the home is usually exempt from being considered in deciding whether the person qualifies for nursing home Medicaid. As a result, the home does **not** have to be sold before the person will qualify. Knowing this may cause you not to sell the conservatee's home when you might otherwise have done so. Although maintenance and tax costs may require its sale.

The Senior Citizens Law Office in Albuquerque offers a free seminar each

month on **Medicaid** for nursing home care. The Department of Senior Affairs¹⁰ also has an excellent program for answering questions on **Medicare** issues. Medicare and Medicaid are completely different programs with different rules and different benefits. Both may be important to the conservatee.

Make Funeral and Burial Arrangements

You should check to see if any funeral and burial arrangements have been made by the conservatee. If none have been made, you can make such arrangements. If the conservatee can tell you what (s)he would prefer, discuss this with him or her. Otherwise, look at the will, cremation authorization and other papers to see if these tell you what (s)he would want. Or talk with the conservatee's family members to find out if they ever discussed this issue when the conservatee was mentally alert.

Confidentiality

The conservatee's finances, including the amount of his or her assets and his or her will and other estate planning papers, are his or her **private** business. You should check with your lawyer before giving anyone else information about these matters. It may be that the judge will want you to share this information with other people, such as certain family members, but that should be clear **before** you send this information to them. Explain to family members that it is your duty to protect the conservatee's privacy and, if you feel information should be shared with them, seek court approval to do so.

As conservator you have the right to receive information about all of the conservatee's assets. If a bank or other business will not cooperate with you or give you information, you should contact your lawyer.

Payments that Can be Made from the Conservatee's Estate

Payments for the Benefit of the Conservatee

¹⁰Look in the blue pages of the telephone directory under City, Department of Senior Affairs for phone numbers of programs in your area or call the Area Agency on Aging number, 1-800-797-3260.

You can use the conservatee's money for the support, education, care or benefit of the conservatee. In deciding how much to spend and on what, you should take into account:

- how much money and other assets the conservatee has;
- the conservatee's **accustomed standard of living**, that is, how the conservatee lived when (s)he was able to manage his or her own finances; and
- any other sources of funds or support that might be available to the conservatee.

An example of another source of support that might be available to the conservatee is the Medicaid program should (s)he need long term nursing home care.

Payments for the Benefit of Those Who Depend on the Conservatee

You may also use the conservatee's money to support people who are **legally dependent** on the conservatee such as:

- a spouse;
- minor children; or
- others who live in the home, are unable to support themselves, and who are in need of support (such as a sister or brother who lives with the conservatee and depends on the conservatee for support).

Conservator's Fees

You can pay yourself a **reasonable fee** for serving as conservator. What is reasonable depends on what you are being paid to do. For example, you can pay yourself more for time making investment decisions than you can for time you spend cleaning out the conservatee's house. Since what is reasonable is different in each case, you should check with your lawyer before deciding on a fee.

Things that may affect fees include the:

- time you spend on the task;
- complexity of the task;
- skill required to do the task; and

- amount of assets the conservatee has.

Although you can charge a fee, you are not required to do so. If you do charge a fee, the fee is **income** to you and should be reported on your state and federal income tax returns. You are also responsible for paying New Mexico gross receipts tax and possibly Social Security taxes on any fees you earn. Depending upon the size of the fee, you may have to make quarterly estimated tax payments to the IRS on the amount you receive.

Your fees as conservator do not have to be approved by the judge unless otherwise provided in the court order appointing you as conservator. However, to protect yourself you may want to get them approved especially if you feel that other family members may question the amounts.

Gifts

If the conservatee's estate has more than enough money to support the conservatee and dependents for the rest of his or her life, you may make gifts to other people or to charities that the conservatee might have been expected to make were (s)he able to do so. The total of such gifts in any year, however, **may not exceed twenty percent (20%) of the conservatee's income** in that year.

Gifts exceeding 20% of the conservatee's income in any year may be made **only if** approved by the court. In most cases, the judge is not likely to approve such gifts. In order to approve gifts larger than 20% of income, the judge would have to find that such gifts are: (1) in the best interest of the conservatee; and (2) that (s)he either is not able (due to incapacity) to agree to the gift **or** (s)he has agreed to making the gift.

It is generally **not** a good idea to make gifts to yourself even if less than 20% of the conservatee's income unless doing so is approved by the judge. If you make gifts to yourself without court approval, it will look like there is a conflict between your interests and that of the conservatee and may result in the court's removing you as conservator. It is your job as conservator to take care of the conservatee and not to benefit yourself.

The conservatorship rules concerning gifting do not make any exception for annual gift tax exclusion gifts (which are presently \$12,000.00 per person per year and which will be indexed for inflation for gifts made after 2006). Whether such gifts can be made are subject to the same considerations set forth above.

Liability of the Conservator (What You Are Responsible for Paying and When You Can Be Sued)

You Do Not Have to Financially Support the Conservatee

You are **not** required just because you are the conservator to financially support the conservatee. Thus, if you are conservator for your mother, you do not have to pay her medical expenses or nursing home care out of your own money.

When you sign contracts or agreements for the conservatee, however, such as the nursing home agreement, it is **very important** that you make clear that you are signing as conservator. You can do this by signing as follows: **[Your name], as Conservator for [Name of Conservatee]**. If you sign a contract for the conservatee in your own name and the person that you are contracting with does not know that you are signing only as conservator for the conservatee, you can be held **personally** responsible for paying on the contract out of your own money.

If You Are Sued, You Will Be Responsible For Paying Damages Out Of Your Own Monies Only If You Are At Fault

If you are sued as conservator, you will be responsible for paying out of your own monies only if you are **personally** at fault. You can be personally at fault because: (1) you did something wrong, such as using the conservatee's money to pay your own bills; or (2) you were negligent, such as being careless in performing your duties as conservator and the conservatee or someone else was hurt as a result. One example would be if you invested the conservatee's money in investments you should have known were unsafe (such as all in junk bonds) and the conservatee lost money as a result. Another example would be if you did not pay the conservatee's homeowners insurance and the house burned down.

If you are not personally at fault and are sued as conservator, any damages would be paid out of the **conservatee's** monies. The person suing would **not** be able to receive any more than the conservatee has, even if the conservatee's assets are not enough to pay the damages.

The court can require you to obtain a **bond** to cover any losses that might result from your wrongdoing or negligence. A bond is different from most insurance in that a bonding company has the right to make you pay it back for any damages that it might pay on your behalf. As a result, getting a bond can be hard unless you yourself have assets from which the bonding company could get paid back if you were sued and found responsible for damages.

Reporting Requirements

Inventory

As discussed on page 40, you must file a listing with the court describing the conservatee's assets and their value **within 90 days** of your appointment as conservator. This is called an **inventory**. If, as you are finding out what assets the conservatee has, you have carefully listed them, you can use the information you collected to prepare the inventory.

The inventory should contain a statement by you stating that it is correct to the best of your knowledge. The inventory must be **signed** by you and your signature **notarized**. The inventory must be filed with the court and copies must be sent to the conservatee if (s)he has the ability to understand it, and to any parent(s) or guardian with whom the conservatee lives.

Conservator's Report and Accounting

Each year, **within 30 days** of the anniversary of your appointment as conservator, you are required to file a conservator's **report and account** with the court. You must also provide a copy of the report and account to the:

- ① judge who appointed you conservator;
- ② conservatee, even if (s)he cannot understand the report; and
- ③ guardian, if there is a guardian; and
- ④ Veterans Administration if the conservatee receives Veterans Administration Benefits.

The **report** should include: (1) information about the conservatee's mental and physical health; (2) descriptions of any important contracts and other agreements entered into during the year for the conservatee; and (3) any important decisions you made. The **account** should list: (1) all payments made from the estate during the year; (2) all income received; and (3) the conservatee's present assets. A sample report form is contained in the Appendix. Since accounts will vary depending on the size and activity of each conservatee's estate, the handbook does not include a sample account form.

It is very important that you file the report and account. If you do not file the report and account on time, you may have to pay the court a **\$5.00 per day penalty** out of your own money for each day that the report is late. If you are

having trouble meeting the deadline, you must ask the court for an extension. If you are late in filing the report, some judges will send you a letter or hold a hearing to have you explain under oath why the report is late.

The report can be filed by going to the clerk of the court where you were appointed conservator. Bring the original and at least four extra copies of the report. The clerk will file the original and will stamp both of the copies with a stamp showing when the original was filed. You should then take one of the copies to the office of the judge who appointed you conservator and leave it with the secretary. Mail another copy to the guardian (if you are not also the guardian) and the conservatee. Keep a copy for your records.

Ending a Conservatorship

You will serve as conservator until you decide you are no longer able or available to handle the responsibility of being a conservator or you become incapacitated yourself. If the court rules that the ward has regained capacity or if your ward dies, you will also be released as conservator. Your lawyer or your ward's lawyer will petition the court to end the conservatorship or change the conservator. Unless your ward has died, or the court allows a change without a hearing, there will be a court hearing on the matter, following the procedures set out in New Mexico law.¹¹ The judge will sign an order formally releasing you from your position as conservator and making any other appropriate order.

If the conservatorship ends because of the ward's death, you must notify the court and provide a copy of the death certificate to the judge. The presiding judge may want you to file a petition to dismiss the conservatorship and submit a corresponding order. If so, you can ask your attorney to do this, or use Forms 8 and 9 at the back of this book. A final conservator's report must be filed at the same time (see Form 6) that reports the applicable information.

If the conservatee moves out of state, you will have to apply to the court in the new location to be conservator. Your lawyer will file a petition asking that your New Mexico conservatorship be recognized in the new state, following the procedures set out in the new state's law.

Serving as conservator for an incapacitated person is a major responsibility with many tasks. Do not agree to serve unless you have the time, skill and patience to do a good job.

¹¹The court procedure for guardianship and conservatorship is discussed in a companion manual called **Alternatives to Guardianship and Conservatorship**, which is available from the New Mexico Guardianship Association at guardianshipnm.org.

Appendix—Resources

There are a number of organizations, public and private, that can help you with your duties as guardian and conservator. Unfortunately, this manual cannot list the phone numbers of all the organizations that exist in your town or near your community. What we can suggest are the resources that may exist near you. For example:

- Adult day health care programs
- Adult social day care programs
- Case or care management services
- Counseling
- Courses at schools and colleges
- Day or employment programs for people with developmental disabilities
- Emergency response devices
- Homemaker, home health, and personal care services
- Legal assistance
- Meal services
- Personal contact programs
- Respite care
- Senior centers
- Transportation services
- Work training programs

Some sources of referrals for assistance:

- The court visitor in your guardianship and conservatorship;
- The social worker department of your local hospital, specifically the discharge planners;
- The regional center for people with developmental disabilities;
- The information and referral department of your Area Agency on Aging.

The following are some specific phone numbers:

The numbers below are for Bernalillo County unless otherwise noted.

The 1-800 and 1-866 numbers are statewide.

There are some really informative Website addresses listed as well.

AARP (Statewide American Association of Retired Persons)..... 1-505-830-3096

Adult Protective Services (Aging and Long Term Services Department)

Statewide intake 1-866-654-3219

Aging and Long Term Services Department.....1-866-451-2901

Santa Fe.....476-4799

Resource Center.....1-800-432-2080

www.nmaging.state.nm.us/

Aging with Dignity.....agingwithdignity.org

Five Wishes / Cinco Deseos available

Alzheimer's Association 266-2195

Statewide 1-800-777-8155

Statewide 24 hour number.....1-800-272-3900

ARC of New Mexico (provides assistance for developmentally disabled community)

..... 883-4630

Statewide 1-800-358-6493

Area Agency on Aging 1-800-797-3260

ASAP (UNMH Addiction and Substance Abuse Programs).....925-2400

Benefits Counseling (Medicare, Medicaid, insurance, other)

Region 1 (Bernalillo County) 265-1244

Other Counties 1-800-432-2080

Case Management (Information & Assistance).....764-6400

(Department of Senior Affairs; **Note:** not every community calls this office by the same name. If you are uncertain of the name in your community, check with the Area Agency on Aging for the office nearest you. (See also Geriatric Care Managers, below.)

Center on Aging, UNM Health Sciences Center272-6082
Geriatrics and Palliative Care

City of Albuquerque Department of Senior Affairs.....764-6400
www.cabq.gov/seniors/socialservices.html

Quick Guide to Senior Services in Bernalillo County contains many useful resources. Additional resource lists about public benefits, housing, transportation, and many other services are available; these lists can also be e-mailed from the Department.

Department of Health

Licensing & Certification 841-5820 (Albuquerque)
Licensing & Certification 476-9025 (Santa Fe)
Licensing & Certification Complaint Hotline 1-800-445-6242 (Santa Fe)

Developmental Disabilities Planning Council – DDPC, State of New Mexico
476-7330 (Santa Fe)
1-800-311-2229
<http://hsc.unm.edu/som/fcm/gec/index.shtml>

Developmental Disability Supports Division.....841-5500
Santa Fe e-mail..... SANTAFEmailbox.ddsd@state.nm.us

Division of Health Improvement.....827-2651 (Santa Fe)

Emergency Medical Service Bureau (EMS) 476-7701 (Santa Fe)
(an information packet with a sample EMS DNR [Do Not Resuscitate] form and an order form for more forms is available from):

State of New Mexico
Injury Prevention & EMS Bureau
2500 Cerrillos Road
Santa Fe, NM 87505

E-mail address: www.nmems.org

Ethics in Health Care; Advance Directives:

Institute of Public Law 277-5006
(provides packets with values history form and optional advance directive for health care form, English and Spanish versions, \$3.00 each)
UNM Institute of Public Law
1117 Stanford NE
Albuquerque, NM 87131

- Institute of Ethics** (UNM Health Sciences Center).....272-4566
www.has.unm.edu/ethics/
 The Joan Gibson Health Care Ethics Certificate Program
 Ethics Committees access information
 Forms available under “Service” section for NM Advance Directives / NM
 Avanzadas Directivas; Values History / Valora la Forma de la Historia
- Food Stamps**841-7700
 NM Human Services Department.....1-800-432-6217
 Statewide NM Income Support Division.....505-832-5026
 Field Offices..... <http://www.hsd.state.nm.us/isd/fieldoffices.html>
- Geriatric Care Managers:**www.caremanager.org
- Geriatric Education Center, UNM Health Sciences Center**.....272-4934
<http://hsc.unm.edu/som/fcm/gec/index.shtml>
 Emphasizing Native American Elder Health
 Annual Summer Geriatric Institute
 Interdisciplinary Geriatric Certificate Program
- Guardianship Services – DDPC, State of New Mexico**1-800-311-2229
 Office of Guardianship.....476-7337 (Santa Fe)
- Home Care, Hospice: NM Association for Home and Hospice Care (NMAHC)**
www.nmahc.org/.....505-889-4556
 also, see your local phone book under these headings
- Human Services Department** (Info & Referral)..... 1-800-432-6217
- Long-Term Care Ombudsman Program** (nursing home oversight)..... 222-4500
 Statewide Resource Center..... 1-800-432-2080
- LREP** (Lawyer Referral for the Elderly Program) 797-6005
 Statewide 1-800-876-6657
- Meals on Wheels** 823-8060
Department of Senior Affairs – DSA Home Delivered Meals...764-6400
 Meal Delivery Information.....848-1399
 In other communities, check with your local senior center or city office.

Medicaid Medical/Financial Assistance (medical and institutional care benefits)

..... 841-7700

Statewide 1-800-432-6217

Waivers and PCO:

Developmental Disabilities (DD)

Disabled and Elderly (D&E)

Traumatic Brain Injury (TBI)

Self-Directed Waiver (Mi Via)

Personal Care Options (PCO)

Contact Aging and Long Term Services..... 1-800-432-2080

or www.nmaging.state.nm.us/ ; www.nmresourcedirectory.org/

Medicare: Applications, cards, Social Security.....1-800-772-1213

Part A claims 1-800-442-2620

Part B 882-5551

Part D..... 1-800-633-4227

Hotline 1-800-633-4227

Website.....www.medicare.gov/

Mental Health Resources, (also check various hospital resources):

Albuquerque Mental Health Housing Coalition.....255-3643

NAMI (National Alliance on Mental Illness).....260-0154, 256-0288

TLS (Transitional Living Services)268-5295

Independent Living Resource Center266-5022

Pathways.....366-2400

UNMH Mental Health Center.....272-2800

National Guardianship Association (NGA).....www.guardianship.org

Ethics and standards for guardians and conservators; other publications; resources nationally. Also, National Guardianship Foundation (NGF) for Registered and Master Guardian exam info.

NAELA National Academy of Elder Law Attorneys.....

Website.....www.naela.com

New Mexico Chapter...(Albuquerque)..... 237-0064

New Mexico Guardianship Association, Inc. (NMGA)

.....www.guardianshipnm.org

Also, New Mexico Guardianship Foundation, Inc. (NMGF)

New Mexico Health Policy Commission 827-7500 (Santa Fe)
 (provides free optional advance directive for health care form)
 435 St. Michael's Dr., Ste. A-202
 Santa Fe, NM 87505

NM Poison and Drug Information Center.....1-800-222-1222
 Poison information line
 Vial of Life program

New Mexico Technology Assistance Program.....1-800-866-2253
 TTY 1-800-659-4915
 Website.....www.nmtap.com/
 assistive technology for people with disabilities

Protection and Advocacy System (advocates of rights of developmentally disabled
 community) 256-3100
 Statewide 1-800-432-4682

RCI (Rehabilitation Center) 255-5501
 (Brain injuries as result of accident)

Senior Citizens Law Office, Inc. 265-2300

Social Security Administration 1-800-772-1213

Society of Certified Public Accountants 246-1699
 (Complaints for their Ethics Committee; can check on professional
 disciplinary record of accountants throughout New Mexico)

State of New Mexico.....www.newmexico.gov

State Bar Disciplinary Board (can check on professional disciplinary record of any
 attorney licensed in New Mexico)..... 842-5781

Support Groups in Albuquerque:www.abqjournal.com/health/support.htm
www.abqjournal.com/health/support-a.htm
 (list is alphabetical; change letter after “support-“, e.g. support-b.htm)
 Look in phone book in other communities or call specific association, e.g.
 Alzheimers’ Assn., NAMI, etc.

Total Community Care, LLC, PACE, In Albuquerque
Program of All-Inclusive Care for the Elderly (PACE).....924-2650

Traumatic Brain Injury (TBI) Resources

Brain Injury Association of New Mexico.....www.braininjurynm.org/
New Mexico Brain Injury Advisory Council – DDPC
505-476-7328; 1-800-311-2229

New Mexico Traumatic Brain Injury Resource Manual

www.nmaging.state.nm.us/html/index.html

includes information on TBI Medicaid Waiver, Case Management

See also **RCI** listing above

Uniform Health Care Decisions Act Optional Form

(a copy of the optional form should be available for a nominal fee from):

Institute of Public Law	or	N.M. Coalition for Advance
1117 Stanford NE		Directives
Albuquerque, NM 87131		2801 Lomas NE
(505) 277-5006		Albuquerque, NM 87106
		(505) 255-6717

Veterans:

New Mexico Department of Veteran’s Services.....505-827-6300
Veterans’ Affairs: Check the Federal listings in the blue pages of the phone book

Waiver: (see Medicaid section above, and Resources Appendix)

Additional Publications:

The Handbook for Guardians and Conservators, a practical guide to New Mexico law, including duties and responsibilities. Available from the New Mexico Guardianship Association, Inc., (NMGA) at www.guardianshipnm.org .

Life Planning in New Mexico, a guide to state law on powers of attorney, right to die, nursing home benefits, wills, trusts and probate. Book by Merri Rudd available at numerous bookstores around the state or directly from Abogada Press, P.O. Box 36011, Albuquerque, NM 87176-6011. Write for ordering information or visit the website at www.abogadapress.com

WITNESS, THE HONORABLE _____, Judge of the District
Court in and for _____ County, New Mexico, and the Seal of said Court, this _____ day
of _____, 19__.

CLERK OF THE DISTRICT COURT

By: _____
Deputy

(SEAL)

Form 2—Acceptance of Appointment in Court Proceeding

Note: This form is for someone who is appointed both guardian and conservator for another. The language in this document will be modified if a person is appointed only as a guardian or conservator.

STATE OF NEW MEXICO
COUNTY OF _____
JUDICIAL DISTRICT COURT

No. PQ

IN RE THE PROTECTIVE PROCEEDING
FOR _____, AN ADULT
INCAPACITATED PERSON.

ACCEPTANCE OF APPOINTMENT AS GUARDIAN AND CONSERVATOR

STATE OF NEW MEXICO)
) ss.
COUNTY OF _____)

I hereby accept the duties of guardian of _____ and conservator of her/his estate and do solemnly swear that I will perform said duties, according to law.

NAME
(address)
(phone)

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 19____.

NOTARY PUBLIC

My Commission Expires:

Form 3—Sample Notice Letter from Guardian

Date

Name
Address
City State Zip

Re: Guardianship of the Person of _____, also known as

Ward's Birthdate:

Ward's Social Security Number:

Dear _____,

Please be advised that I have been appointed guardian of _____. I have enclosed a copy of the Letters of Guardianship for your files. Please contact me about any of _____'s health issues.

Sincerely,

Name
Address
City, State, Zip
Phone

Enclosure

Form 4—Sample Notice Letter from Conservator

Date

Name
Address
City State Zip

Re: Conservatorship of the Estate of _____, also known as

Conservatee's Birthdate:

Conservatee's Social Security Number:

Dear _____,

Please be advised that I have been appointed conservator of the estate of _____. Please have all future checks [this letter will vary, depending on what it is being used to do] made out to me _____, Conservator of the Estate of _____. I have enclosed a certified copy of the Letters of Conservatorship for your files. Please contact me about any of _____'s financial matters at the address listed on this letter.

Sincerely,

Name
Address
City, State, Zip
Phone

Enclosure

Form 5—Sample Inventory of Assets

STATE OF NEW MEXICO
COUNTY OF _____
JUDICIAL DISTRICT COURT

No. PQ

IN RE THE GUARDIANSHIP AND CONSERVATORSHIP
FOR [NAME OF CONSERVATEE], AN ADULT
INCAPACITATED PERSON.

INVENTORY OF ESTATE
PURSUANT TO 45-5-418 NMSA 1978

[NAME OF CONSERVATOR], conservator for [NAME OF CONSERVATEE], states that the following represents all of the property owned by [NAME OF CONSERVATEE] as of [DATE OF APPOINTMENT AS CONSERVATOR], which has come to the knowledge of the aforesaid named conservator. The estimated value of the property as of [DATE OF APPOINTMENT AS CONSERVATOR], is shown, together with encumbrances thereon:

ASSETS AND INCOME OF [NAME OF CONSERVATEE]:

Description of Asset: Value:

Income: Amount:

**[NAME, ADDRESS, AND TELEPHONE
NUMBER OF CONSERVATOR]**

Date: _____

VERIFICATION

I, the undersigned, state upon oath that I have reviewed the foregoing Inventory of the Estate of **[NAME OF CONSERVATEE]**, and that it is complete and accurate as far as I am informed.

**[NAME, ADDRESS, AND TELEPHONE
NUMBER OF CONSERVATOR]**

SUBSCRIBED AND SWORN to before me this _____ day of _____,
199__, by **[NAME OF CONSERVATOR]**.

Notary Public

My Commission Expires:

Form 6—Sample Conservator’s Report

Note: This form is for someone who is appointed only conservator for another. The language in this document can be modified by combining Forms 6 and 7 if a person is appointed as both guardian and conservator.

STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT COURT

No. PQ

IN RE THE CONSERVATORSHIP FOR
[NAME OF CONSERVATEE], AN ADULT
INCAPACITATED PERSON.

CONSERVATOR'S REPORT

Pursuant to NMSA 1978 Section 45-5-409, the undersigned duly appointed, qualified and acting conservator of the above-mentioned protected person reports to the court as follows:

1. My name is: _____

2. My address and telephone number is: _____

3. The name, if applicable, and address of the place where the person under conservatorship now resides are: _____

_____.

4. The name of the person primarily responsible for the care of the person under

conservatorship at such person's place of residence is:

5. The name and address of any hospital or other institution where the person under conservatorship is now admitted on a temporary basis are:

6. A brief description of the physical condition of the person under conservatorship is: _____

7. A brief description of the mental condition of the person under conservatorship is:

8. A description of contracts entered into on behalf of the person under conservatorship during the past year: _____

9. Describe all financial decisions made during the past year including how all

income was distributed, any sale, lease or mortgage of estate assets and any investment made on behalf of the person under conservatorship:

10. The reasons, if any, why the conservatorship should continue are:

Conservator's Account of Administration

The undersigned conservator hereby sets forth the following summary of receipts and disbursements of the estate during the period from _____ to _____ **[REPORTING PERIOD]:**

A. Assets of the estate as of **[BEGINNING DATE OF REPORTING PERIOD]:**

B. Receipts of estate from _____ to _____ **[REPORTING PERIOD]:**

C. Disbursements from estate from ____ to ____ **[REPORTING PERIOD]:**

D. Assets of estate as of **[LAST DAY OF REPORTING PERIOD]**:

**[NAME, ADDRESS, AND TELEPHONE
NUMBER OF CONSERVATOR]**

Date: _____

Form 7—Sample Guardian’s Report

Note: This form is for someone who is appointed only guardian for another. The language in this document can be modified by combining Forms 6 and 7 if a person is appointed as both guardian and conservator.

STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT COURT

No. PQ

IN RE THE GUARDIANSHIP FOR
[NAME OF WARD], AN ADULT
INCAPACITATED PERSON.

GUARDIAN'S REPORT

Pursuant to NMSA 1978 Section 45-5-314, the undersigned duly appointed, qualified and acting guardian of the above-mentioned incapacitated person reports to the court as follows:

1. My name is: _____.

2. My address and telephone number are: _____

_____.

3. The name, if applicable, and address of the place where the incapacitated person now resides are: _____

_____.

4. A description of the incapacitated person's place of residence and of programs, activities or services in which the incapacitated person is involved is as follows:

5. The name of the person primarily responsible for the care of the incapacitated person at such person's place of residence is: _____.

6. The name and address of any hospital or other institution where the incapacitated person is now admitted on a temporary basis are:

7. A brief description of the incapacitated person's physical condition is:

8. A brief description of the incapacitated person's mental condition is:

9. A brief description of contracts made on behalf of the incapacitated person during the past year is: _____

10. A brief description of major decisions made on the incapacitated person's behalf during the past year is:

11. The reasons, if any, why the guardianship should continue are:

Signature of Guardian: _____

Date: _____

Form 8—Sample Petition and Order to Dismiss Case

Note: This form is for someone who is appointed both guardian and conservator for another. The language in this document can be modified if a person is appointed as just guardian or conservator.

STATE OF NEW MEXICO
COUNTY OF _____ JUDICIAL DISTRICT COURT

No. PQ

IN RE THE PROTECTIVE PROCEEDING
FOR [NAME OF WARD], AN ADULT
INCAPACITATED PERSON.

**PETITION TO TERMINATE GUARDIANSHIP
AND CONSERVATORSHIP PROCEEDINGS**

COMES NOW the Petitioner, _____, and for her Petition to Terminate Guardianship and Conservatorship, states as follows:

1. Petitioner was appointed as Guardian and Conservator on _____.
2. Petitioner has filed her annual guardian and conservator reports.
3. _____ passed away on _____. A copy of his death certificate

is attached as **Exhibit “A”**.

4. Therefore, the guardianship and conservatorship should be discontinued.

WHEREFORE, Petitioner prays for:

A. An Order terminating the guardianship and conservatorship after submission of the final Guardian and Conservator reports;

- B. For such other and further relief as this Court deems just and proper.

proceeding, and as grounds therefore states that _____.

Respectfully submitted,

Name
Address
City, State, Zip
Phone number

I certify that a true and correct
copy of this Petition was mailed
to the following parties this ____
day of _____, 20__:

Names and addresses of closest family members to ward

Your name

Form 9 -- Order to Terminate Guardianship and Conservatorship Proceedings

STATE OF NEW MEXICO
COUNTY OF [NAME OF COUNTY]
[# OF DISTRICT] JUDICIAL DISTRICT COURT

NO. CVPQ _____[CASE NUMBER]

IN RE THE PROTECTIVE PROCEEDING
FOR [NAME OF WARD], AN ADULT
INCAPACITATED PERSON.

**ORDER TO TERMINATE GUARDIANSHIP
AND CONSERVATORSHIP PROCEEDINGS**

THIS MATTER came before the Court on Petitioner's Petition to Terminate Guardianship and Conservatorship. The Court considered the matter, and being fully advised in the premises, **FINDS:**

5. _____ died on _____.

6. The Petitioner's final guardian and conservator reports have been filed and are accepted by the Court.

7. The guardianship and conservatorship should be discontinued.

IT IS THEREFORE ORDERED that the guardianship and conservatorship of _____ is terminated.

DISTRICT COURT JUDGE

SUBMITTED BY:

Name
Address
City, State, Zip
Phone number

Form 10 -- Cremation Authorization Form
(from **Life Planning in New Mexico**, by Merri Rudd, Abogada Press)

On this _____ day of _____, 200__

I, _____
(print your name), hereby state that upon my death it is my desire to be cremated and that my cremated remains be disposed of in the following manner: *(state where you want your cremated remains scattered/buried, if desired; also, you may note who is authorized to take your ashes from the crematory)*

Signature of Declarant

This form must be signed above by you and below by either two witnesses or a notary public using the appropriate format that follows.

WITNESSES

We believe the person who signed this document to be of sound mind and under no constraint or undue influence. On this _____ day of _____, 200__,
_____ (name),
of _____ (address), signed this document, consisting of one page, in our sight and presence and declared the same to be his/her cremation wishes, and at his/her request and in his/her sight and presence and in the sight and presence of each other, we signed our names as witnesses.

_____ residing at

Witness Signature Address

_____ residing at

Witness Signature Address

STATE OF NEW MEXICO)

) ss.

COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of

_____,
200__, by _____ (declarant's name).

Notary Public

My Commission Expires

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About the Authors

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Susan Tomita is an elder law and estate planning attorney in Albuquerque, New Mexico.

2007 Revision

The New Mexico Guardianship Association, Inc. (NMGA) is a 501(3)(6) organization formed in September 2004, and affiliated with the National Guardianship Association.

MISSION OF THE NEW MEXICO GUARDIANSHIP ASSOCIATION, INC.

TO ensure the highest standards of ethics and practice in Guardianship/Conservatorship in New Mexico.

TO serve and protect the best interests of those receiving services.

TO promote communication and sharing of resources and experience.

TO promote awareness of the association and respect for the Guardianship/Conservatorship profession.

TO advocate for and contribute to the development of effective regulation and legislation for the benefit of those receiving services.

.....

Lori L. Millet is an elder law and estate planning attorney with Swaim, Schrandt & Millet, PC, in Albuquerque, New Mexico, and Vice-President of the NMGA.

Susan K. Tomita is still an elder law and estate planning attorney in Albuquerque, New Mexico and a member of the NMGA.

Susan A. Bennett of Bennett Guardianship and Case Management, is a state licensed social worker, a Registered Guardian through the National Guardianship Foundation, and President of the NMGA.